

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902 AND 1903

No. 100-78

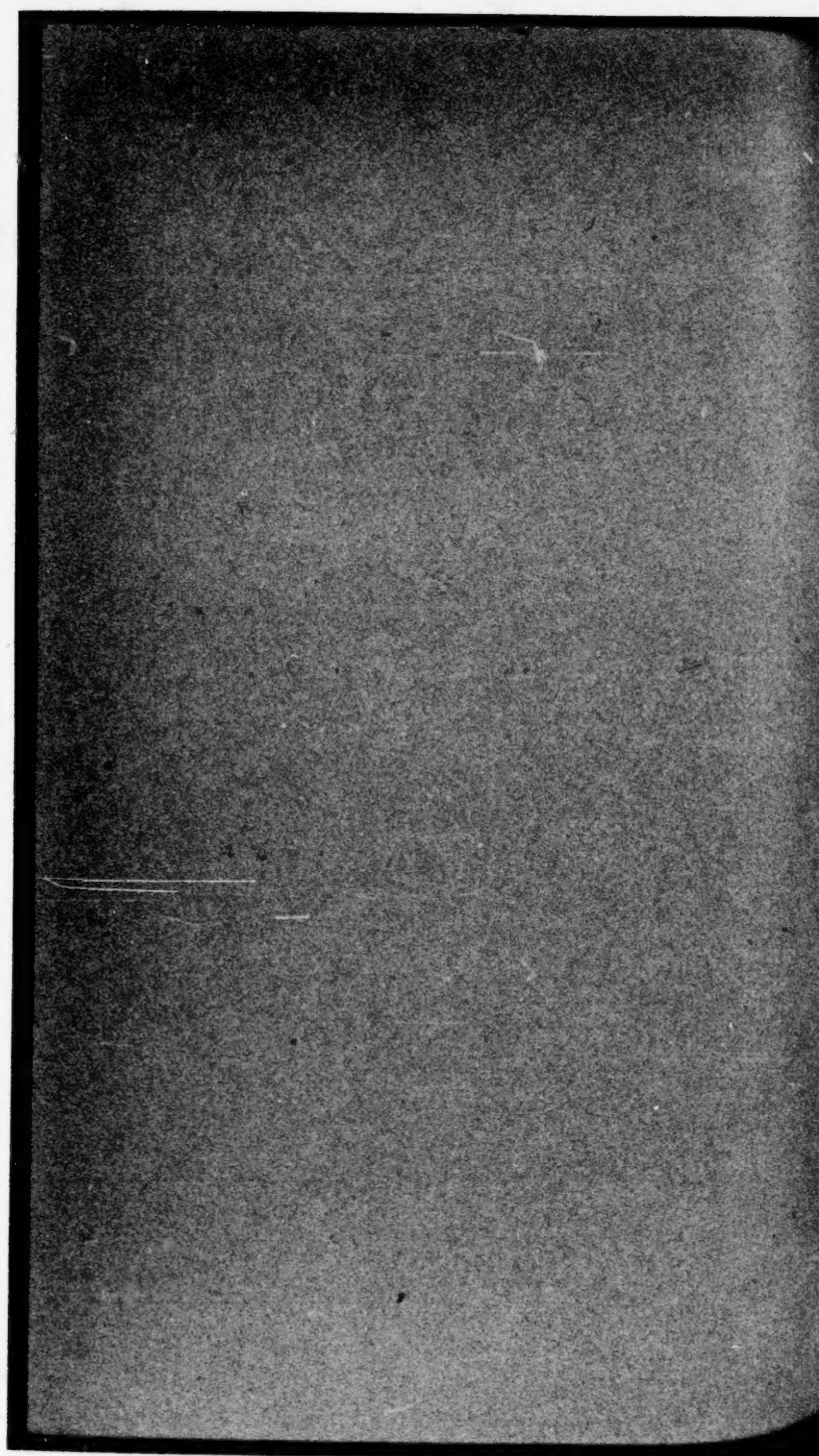
JOHN F. DARNELL, EXECUTOR OF THE ESTATE OF
WILLIAM M. DARNELL, DECEASED, AND WALTER
DARNELL, PLAINTIFFS IN ERROR,

THE STATE OF INDIANA,

DEFENDANT, TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED JUNE 22, 1904.

(23,327.)



(22,227.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 606.

HENRY Y. DARNELL, EXECUTOR OF THE ESTATE OF
ISAAC M. DARNELL, DECEASED, AND WALTER S.
DARNELL, PLAINTIFFS IN ERROR,

vs.

THE STATE OF INDIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 & 2 STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore to-wit: on the 30th day of December 1908, the same being the 33rd judicial day of the November Term 1908, of said court, Isaac M. Darnell and Walter S. Darnell, by their attorneys Cockroft & Odle, Chas. A. Weathers and Joseph F. Cowern filed in the office of the Clerk of the Supreme Court of the said State of Indiana a transcript of the record and proceedings in the Marion Circuit Court of said State in a cause wherein the State of Indiana was appellee, together with an Assignment of Errors which transcript and Assignment of Errors, together with an appeal bond, are in the words and figures following to-wit:

3 Be it remembered, That among the records of proceedings had and papers filed in the Marion Circuit Court of Marion County, State of Indiana, are the following in the cause of

No. 16391.

STATE OF INDIANA

VS.

ISAAC M. DARNELL, WALTER S. DARNELL.

Be it also remembered, That heretofore to-wit: on the 23d day of November, 1907, the above named plaintiff, by counsel, filed in the office of the Clerk of said Court, a complaint against the said defendants, which complaint is in the words and figures following:

4 STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, November Term, 1907.

STATE OF INDIANA

v.

ISAAC M. DARNELL, WALTER S. DARNELL.

Complaint.

Suit to Set Aside Conveyance, Impress Property with a Trust, Foreclosure Lien, and Receiver.

The State of Indiana brings this suit as *pars patriæ* and trustee for all of the people of the said state and more particularly for the people of the said county and the use and benefit of the various political sub-divisions of said county, and alleges:

That, continuously, during the entire year of 1907, Cyrus J. Clark, was, and now is, the duly elected, qualified, and acting Auditor of Marion County, in the said State.

The defendant, Isaac M. Darnell, was a resident of the City of Indianapolis, county and state aforesaid, and was a resident of
 5 the said city for each of the years from 1900 to 1907, inclusive, and received, accepted and enjoyed all of the benefits and immunities accruing to him as a resident of the said city, and maintained his domicile at said city continuously during each of the said years.

That William F. Charters was, and has been, employed for the last four years next preceding the 25th day of June, 1907, by the Board of Commissioners of Marion County in said State, to assist in discovering property not listed and assessed for taxation as required by law; and to report omitted property to the proper taxing officials, for assessment.

That, upon March 28th, 1907, Cyrus J. Clark, as Auditor aforesaid, received credible information that the defendant, Isaac M. Darnell, as a resident of the said county of Marion, had concealed certain property from taxation, and the said information was in the words and figures as follows, to-wit:

"INDIANAPOLIS, INDIANA, *March 28, 1907.*

Cyrus J. Clark, Esq., County Auditor, Marion County, Ind.

DEAR SIR: I herewith report to you the following facts with regard to the tax matter of Isaac M. Darnell, a resident of 1608
 6 Central Avenue, Indianapolis, Indiana. Mr. Darnell was the owner of certain shares of stock in the I. M. Darnell & Son Company, a corporation incorporated under the laws of the State of Tennessee and located at Memphis, Tennessee, which was incorporated prior to 1900, and that he was the owner of such shares of stock for the years 1900 up to the and including 1907; that no return whatever was ever made by him, and the same has escaped taxation entirely. You will please issue citation requiring him to appear and show cause why tax additions should not be made against him and the taxes thereon extended as the law provides.

Respectfully submitted,

W. F. CHARTERS,

W. E. LOWE,

Tax Adjusters."

That, upon the said date, in the said notice, the said Clark, as Auditor, received information that the defendant, Isaac M. Darnell, was a resident of the county and state aforesaid for the years set out above; that he was the owner of shares of stock in I. M. Darnell & Son Company, a corporation incorporated under the laws of the State of Tennessee; that no return was ever made by him in Marion
 7 County or other places in the State of Indiana for assessments of the said stock for taxation, and that the said stock has escaped taxation entirely and that the said Clark, Audi-

tor, was, requested to notify said Isaac M. Darnell, to appear and show cause why the said stock should not be assessed for taxation.

That the said Isaac M. Darnell owned shares of the capital stock of I. M. Darnell & Son Company, as aforesaid, for the years and in the amounts as follows, to-wit:

1900	\$89,300.00
1901	89,300.00
1902	89,300.00
1903	49,300.00
1904	49,300.00
1905	49,300.00
1906	49,300.00
1907	49,300.00

That on the 4th day of May, 1907, said Clark, Auditor, aforesaid, sent to the said Isaac M. Darnell a notice to appear before the said Clark, at the office of the County Auditor, in the Court House in the City of Indianapolis, in the State of Indiana, on or before the 10th day of May, 1907, and to show cause, if any, why the said stock should not be assessed and added to the tax duplicate as property omitted from taxation, and be listed and assessed to the said Isaac M. Darnell, and the taxes extended thereon, as provided by law.

That the said notice was sent to the said Isaac M. Darnell by registered letter deposited in the United States mail at Indianapolis, and addressed to him at Memphis, Tennessee, care of

Walter S. Darnell, son of said Isaac M. Darnell, and that the said notice was receipted for by the said Walter S. Darnell. That thereupon the said Walter S. Darnell, for and on behalf of Isaac M. Darnell, took up the question of the said omission of property from taxation with the proper authorities and acknowledged receipt of the said notice for and on behalf of the said Isaac M. Darnell. Your relator is informed and believes and alleged that the notice was received by Isaac M. Darnell five days previous to the 10th day of May, 1907. That the said notice to Isaac M. Darnell was in the words and figures as follows, to-wit:

"To Isaac M. Darnell, 1608 Central Ave., City:

On the 4th day of May, 1907, W. F. Charters, who has been and is now employed by the Board of Commissioners of Marion County, Indiana, to assist in discovering property not listed and assessed for taxation as required by law, filed in my office a report, showing that for the years hereinafter named, you were the owner of moneys, moneys loaned and credits not listed and assessed for taxation, to-wit:

9	Moneys, Loans and Credits omitted from assessment of 1900	\$89,300.00
	Moneys, Loans and Credits omitted from assessment of 1901	89,300.00
	Moneys, Loans and Credits omitted from assessment of 1902	89,300.00

Moneys, Loans and Credits omitted from assessment of 1903	49,300.00
Moneys, Loans and Credits omitted from assessment of 1904	49,300.00
Moneys, Loans and Credits omitted from assessment of 1905	49,300.00
Moneys, Loans and Credits omitted from assessment of 1906	49,300.00
Moneys, Loans and Credits omitted from assessment of 1907	49,300.00

You are therefore hereby notified that unless you appear before me at the office of the County Auditor in the Court House, in the City of Indianapolis, in the State of Indiana, on or before the 10th day of May, 1907, and show cause, if any, why said property should not be assessed and added to the Tax Duplicate, the same will be listed and assessed to you, and the taxes extended thereon as the law provides.

10 This 4th day of May, 1907.

Very respectfully,

C. F. CLARK,

County Auditor of Marion County, Ind.

That, upon the 25th day of June, 1907, the said William F. Charters filed in the office of the said Clark, Auditor, a written report containing credible information showing that Isaac M. Darnell was a resident of the said city as hereinbefore alleged; that he was the owner of shares of stock as herein alleged, in I. M. Darnell & Son Company, in the amounts and for the years as set out above. That the said Isaac M. Darnell had been notified on the 4th day of May, 1907, to appear on the 10th day of May, 1907, and show cause why the said stock should not be assessed as omitted property, and that a hearing would be had in the office of the County Auditor in the Court House at Indianapolis, upon the said date, and that the said Isaac M. Darnell had failed and refused to appear before the County Auditor, pursuant to the said notice; and that, thereupon, the said Clark, Auditor, heard the matter of the omission of the said property, and the same was submitted to him for final hearing and determination as to the listing and assessment thereof for the amounts and years as aforesaid. And the said Clark, Auditor, after hearing the evidence and being fully advised in the premises, found that the said Isaac M. Darnell was a resident of the City of Indianapolis as aforesaid, on the 1st day of April, 1900, up to and including 1903, and on the 1st day of March, 1904, up to and including 1907, and was the owner of the shares of stock of the said I. M. Darnell & Son Company for the years and in the amounts as alleged herein, and that the said property had never been returned nor assessed for taxation in Marion County or in the State of Indiana, and had wholly escaped taxation in the said State.

That, thereupon, the said Clark, Auditor, after such hearing, held

and determined that the said property should be assessed against the said Isaac M. Darnell for the said years and amounts and that the taxes thereon amount to \$10,568.59, and he thereupon assessed the said property as omitted property which had unjustly escaped taxation and which had not heretofore been assessed for the said years; and then and there corrected the proper tax duplicate and added the said omitted property thereto, and extended the taxes thereon for each of the years aforesaid in which said property was omitted. That the said finding and determination of Cyrus J. Clark, Auditor, is in the words and figures as follows, to-wit:

12 "In the Matter of the Assessment of Omitted Personal Property, Moneys, Money Loaned and Credits, Belonging to Isaac M. Darnell, a Resident of the City of Indianapolis, Marion County, Indiana.

Be it remembered, That heretofore, to-wit: on the 4th day of May, 1907, W. F. Charters, filed in the county auditor's office of said county, a written report, a copy of which is attached hereto marked Exhibit "A" and made a part hereof, showing that Isaac M. Darnell is now a resident of the city of Indianapolis, Marion County, Indiana, and that he was a resident of the city of Indianapolis, Marion County, Indiana, on April 1st, 1907, up to and including April 1st, 1903, and on the 1st day of March, 1904, 1905, 1906 and 1907; and that he was the owner of certain shares of foreign stock in the I. M. Darnell & Son Co., a corporation incorporated under the laws of the State of Tennessee, and located at Memphis, Tennessee, for the years hereinafter named, which shares of foreign stock have not been listed and assessed for taxation and are and have been omitted in whole or in part as shown by said report from the assessment lists and tax duplicates of Marion County, said State, and as shown by said report for the years following, to-wit:

For the year 1900, 893 Shares in I. M. Darnell & Son Co.	\$89,300.00
For the year 1901, 893 Shares in I. M. Darnell & Son Co.	\$89,300.00
For the year 1902, 893 shares in I. M. Darnell & Son Co.	\$89,300.00
13 For the year 1903, 493 shares in I. M. Darnell & Son Co.	\$49,300.00
For the year 1904, 493 shares in I. M. Darnell & Son Co.	\$49,300.00
For the year 1905, 493 shares in I. M. Darnell & Son Co.	\$49,300.00
For the year 1906, 493 shares in I. M. Darnell & Son Co.	\$49,300.00
For the year 1907, 493 shares in I. M. Darnell & Son Co.	\$49,300.00

And thereupon, on the 4th day of May, 1907, I duly issued a written notice, a copy of which is attached hereto, marked exhibit

"A" and made a part hereof, and fixed the 10th day of May, 1907, as the time, and the office of the county auditor in the court house in the city of Indianapolis, Marion County, Indiana, as the place where I would hear the objections to the listing and assessment of said omitted property, which notice and exhibit were enclosed in an envelope and addressed to the said Isaac M. Darnell at his usual place of residence in the city of Indianapolis, Marion County, Indiana, as the law provides.

And afterwards to-wit: on the 21st day of June, 1907, the said Isaac M. Darnell failing and refusing to appear before me and show cause why such additions should not be made against him as shown in Exhibit "A" herewith attached, thereupon said cause and proceeding were submitted for final hearing and determination

14 as to the listing and assessment of said omitted property and for all of the omitted property for each and all of the years, and after hearing the evidence and being fully advised in the premises, I find that the said Isaac M. Darnell was a resident of the city of Indianapolis, Marion County, Indiana, on the 1st day of April, 1900, up to and including 1903, and on the 1st day of March, 1904, up to and including 1907, and he was the owner of shares of foreign stock in the I. M. Darnell & Son Co. corporation which have been omitted from the tax duplicate and not listed and assessed as follows, to-wit:

	Amount omitted.	Rate.	Taxes.
For the year 1900, shares of foreign stock	\$89300	192	\$1714.56
For the year 1901, Shares of foreign stock	89300	195	1741.35
For the year 1902, shares of foreign stock	89300	208	1857.44
For the year 1903, shares of foreign stock	49300	209	1030.37
For the year 1904, shares of foreign stock	49300	214	1055.02
For the year 1905, shares of foreign stock	49300	213	1050.09
For the year 1906, shares of foreign stock	49300	216	1064.88
For the year 1907, shares of foreign stock	49300	216	1064.88
Total amount of taxes due.....			10578.59

I now here, by virtue of my office as county auditor of Marion County, State of Indiana, Assess said property as omitted property which has unjustly escaped taxation and which has not heretofore been assessed for the several years aforesaid, and now I correct the proper tax duplicate and add said omitted property thereto and extend the taxes thereon for each of the years in which said property was omitted in whole or in part.

Witness my hand and seal, this 21st day of June, 1907.

(Signed)

CYRUS J. CLARK,

County Auditor, Marion County."

Plaintiff alleges that the said Isaac M. Darnell was the owner of real estate in Marion County, in said State, of the value of \$8,000.00, and that the said property is described as Lot 208 and the North Half of Lot 207, in Allen & Root's North Addition to the City of Indianapolis, in said county and state. That after the said W. F. Charters, under his employment as aforesaid, had, on March 28th, 1907, given notice to said Isaac M. Darnell of the omission of the said property from taxation, and the intention of the proper taxing officials to assess the same as omitted property, the said Isaac M. Darnell, for the purpose and with the intention to cheat, hinder and delay the state, county, city and Board of School Commissioners and other taxing bodies, as aforesaid, and for the fraudulent purpose of preventing the collection of the taxes due by the said Isaac M. Darnell as aforesaid, and of his indebtedness, the said Isaac M.

16 Darnell did, by his certain warranty deed, of the date April 25th, 1907, convey the said real estate to the said defendant, Walter S. Darnell, for the consideration of \$8500.00, but plaintiff says that, in truth and in point of fact, no consideration whatever was paid or promised or agreed to be paid by the said defendant Walter S. Darnell for the said real estate, and that the said Walter S. Darnell did not, in truth and in fact, pay any consideration whatever therefor. That, at the time said conveyance was so made, said defendant Isaac M. Darnell did not have, nor has he had since, nor has he now, sufficient other property subject to execution with and out of which to pay the said taxes and indebtedness, and out of which said debt and claim can be made. That in truth and in point of fact, he has no other property whatever subject to execution in the State of Indiana. That since the notice to said Isaac M. Darnell of the claim of the state, county and board aforesaid, the said Darnell devised the scheme of transferring all of his property to his children and dividing it up among them in order to cheat, hinder, delay and defraud this plaintiff and those whom she represents from collection of the taxes aforesaid legitimately accruing by reason of the fraudulent omissions of the said Isaac M. Darnell.

17 The plaintiff alleges that the cash value of said real estate does not exceed \$8,500.00 and is insufficient to pay plaintiff's claim. That the rents and profits of said property, so plaintiff is informed and states, amount to the sum of \$1,000 per year, and the same are being and will continue to be removed from this state and wasted and lost; greatly to the prejudice of plaintiff's lien and claim. That unless a temporary receiver is immediately appointed for the said real estate, its rents and profits, great and irreparable harm and injury will result to plaintiff.

That said claim of plaintiff is now due and unpaid and an itemized statement thereof is attached hereto and made a part hereof marked exhibit "A", and amounts to the sum of \$— including delinquent penalty.

That said real estate is insufficient in value to pay plaintiff's claim unless a receiver is appointed for the rents and profits thereof and the same are applied in payment of plaintiff's claim.

Plaintiff is informed and states that, since the transfer of the said

real estate, the said Isaac M. Darnell has removed his residence and all of his property from the state of Indiana, with the intent and purpose to cheat, hinder, delay and defraud plaintiff, and prevent the collection of the taxes aforesaid, and that the transfer of 18 real estate to his son, Walter S. Darnell, was made with that purpose and intent.

Plaintiff is informed and states that the said Isaac M. Darnell has transferred all of his stock in the said I. M. Darnell & Son Company to his children or other persons without consideration, with the intent and for the purpose of preventing the collection of the taxes which are justly due and owing by him to plaintiff.

Plaintiff alleges that there is now due and owing to her the sum of \$—, as taxes due from the said Isaac M. Darnell; that the said taxes appear upon the delinquent tax duplicate of Marion County in said state; that the said Isaac M. Darnell has, and is now refusing to pay said taxes, and is transferring, and has transferred, his property for the purpose of defeating the collection of the said taxes, and that, in point of fact, the said Walter S. Darnell holds the said property in trust for the said Isaac M. Darnell; that the said property is subject to the lien of the State of Indiana for the payment of said taxes in full.

Wherefore, plaintiff prays, First That your plaintiff have a discovery from each of the defendants of all of the property, 19 notes, moneys, accounts and deposits belonging to the said Isaac M. Darnell, together with an examination of all of the said notes, moneys, accounts, papers, bank books and books of account of each of the defendants. Second—that a preliminary restraining order issue from this court, and upon further hearing, a temporary injunction issue herein, restraining and enjoining each of the said defendants from removing or concealing the property of said Isaac M. Darnell from the jurisdiction of this court, and from hindering or delaying plaintiff from collection of said taxes and from a discovery of his said property. Third—That the property be decreed to be held in trust by said Walter S. Darnell for the use and benefit of said Isaac M. Darnell, and that said trust be closed and said property sold to pay plaintiff's claim. Fourth—That said conveyance be set aside and the said deed be declared void, of no effect and fraudulent and the said real estate be made subject to the payment of said taxes and indebtedness to plaintiff and that the lien of plaintiff for said taxes be decreed paramount to all others and that the same be foreclosed against the said real estate and that a temporary receiver thereof be appointed until final hearing of this cause and at final hearing, that a permanent receiver be 20 appointed to reduce the said real estate to money to pay plaintiff's claim; that plaintiff have judgment for twelve thousand dollars and for all other proper relief.

JAMES BINGHAM,

Attorney General, State of Indiana.

MORTON S. HAWKINS,

MERRILL MOORES,

Of Counsel.

Verification of Complaint.

STATE OF INDIANA,
Marion County, ss:

W. E. Lowe, being first duly sworn, says that he makes this affidavit on behalf of the plaintiff; that he is engaged in the discovery of property omitted from taxation in and for said county and has knowledge of the facts in the above complaint; that the facts alleged therein are true as he verily believes and that the facts alleged therein on information affiant believes to be true.

W. E. LOWE.

Subscribed and sworn to before me this 21st day of November, 1907.

NEWTON J. McGUIRE.

Notary Public.

[SEAL.]

My commission expires Dec. 1st, 1910.

21 And afterwards to-wit: on the 23d day of November, 1907, being the 18th judicial day of the November term, 1907, of said court, before the Hon. Henry Clay Allen, Judge thereof, the following proceedings were had herein, viz:

"Comes the plaintiff and files affidavit that defendants are not residents of the State of Indiana, as follows:

STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, November Term, 1907.

No. —.

STATE OF INDIANA

vs.

ISAAC M. DARNELL, WALTER S. DARNELL.

Affidavit of Non-Residence.

Morton S. Hawkins, being first duly sworn upon his oath says, that he is one of the attorneys for the plaintiff in the above entitled cause.

That the said Isaac M. Darnell and Walter S. Darnell are not residents of the State of Indiana, and that this action is to enforce a lien upon real estate within the county of Marion, State of Indiana and is for the possession of real estate within the said state.

22

Wherefore, plaintiff asks that the court order publication of the summons for the said defendants.

JAMES BINGHAM.
MORTON S. HAWKINS.
MERRILL MOORES.

Subscribed and sworn to before me this 22d day of November, 1907.

My commission expires Jan. 9, 1909.

[SEAL.]

A. N. CAVE,
Notary Public.

Notice by Publication Ordered.

Thereupon, on motion notice by publication as prescribed by law, is ordered given said defendants to January 22d, 1908.

And afterwards to-wit: on the 26th day of November, 1907, being the 20th judicial day of the November term, 1907, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Comes the plaintiff and files amendment to the complaint herein, as follows:

23

Amendment to Complaint.

STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, November Term, 1907.

No. 16391.

STATE OF INDIANA
v.
ISAAC M. DARNELL, WALTER S. DARNELL.

Amendment to the Plaintiff's Complaint.

The State of Indiana, the plaintiff in this cause, before any answer has been made by the defendants or either of them, now hereby makes the following amendment to its complaint in this cause, to-wit:

Plaintiff is informed and states that there is a large amount of personal property belonging to the defendant, Isaac M. Darnell, situate in the house upon the real estate described in the complaint, and that the said property consists of furniture, carpets and various other kinds of personal property and chattels, and that the same are worth \$500. This plaintiff had no knowledge of the existence of the said personal property within the said county at the time it filed its

24 complaint in this cause, but learned that fact afterwards, and plaintiff alleges that by reason of the departure of the said Isaac M. Darnell from this state the county treasurer neither in person or by deputy can call upon the said Isaac M. Darnell and make a demand for the amount of the delinquent taxes in question in this cause, and that the said Isaac M. Darnell is not resident in the said county and the said state, and the said treasurer therefore, is unable to proceed to levy upon the said personal property to pay such taxes, penalties and costs of sale and to sell the same as provided in such cases.

That by reason of the absence of the said Isaac M. Darnell from the said state and county no such levy can be made upon said personal property, and that the said personal property will be removed from the said county and state unless a temporary receiver is appointed immediately without notice to the defendants in this cause, to hold the said personal property and the said real estate pending the final determination of this cause and the further orders of this court.

That great and irreparable injury will result to the plaintiff unless such temporary receiver is appointed without notice, and that the damage and injury that will accrue to plaintiff if this court
25 should refuse to so appoint such receiver, cannot be measured in dollars and cents and cannot be determined.

That a period of about two months will ensue between the time of the filing of this complaint and the proof upon which service by publication will be had upon the defendants herein, and that in the meantime an imperative necessity exists for this court to take possession of the said real estate and personal property and hold the same subject to the determination of the plaintiff's claim and lien.

That the said real estate and personal property is standing idle and the rents and profits of the same are being lost and dissipated.

Wherefore, plaintiff *plaintiff* prays that a temporary receiver of the said property and real estate be appointed forthwith without notice to defendants, and that the said receiver be directed to take immediate possession of the said property and hold the same until the further orders of this court, and for all other proper relief.

JAMES BINGHAM,
Attorney General.

MORTON S. HAWKINS,
MERRILL MOORES,
Of Counsel.

26 *Verification of Amendment to Complaint.*

STATE OF INDIANA,
County of Marion, ss:

W. E. Lowe, being first duly sworn under oath says, that he is employed in the discovery of omitted property in said county and that he makes this, his affidavit, in the course of said employment, and that the facts averred in the above amendment to the complaint

are true as he verily believes, and the facts averred upon information he believes to be true.

(Signed)

W. E. LOWE.

Subscribed and sworn to before me this 25th day of November, 1907.

My commission expires March 1, 1911.

(Signed)

MERRILL MOORES,
Notary Public.

27 And afterwards to-wit: on the 4th day of December, 1907, being the 3d judicial day of the December term, 1907, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Special Appearance of Emma Darnell.

"Comes the plaintiff by counsel and comes also Cockroft and Odle and enter appearance, specially for Emma Darnell and files application asking that said Emma Darnell be admitted a party defendant to this action, as follows:

Application of Emma Darnell to be Admitted as a Party.

STATE OF INDIANA,
Marion County:

Circuit Court of Marion County, 1907.

No. 16391.

STATE OF INDIANA

v.

ISAAC M. DARNELL and WALTER S. DARNELL.

Application to be Admitted as Party Defendant.

Comes now Emma Darnell, a citizen and resident of the State of Tennessee, by her counsel and petitions the court to be admitted as a party defendant in the above entitled cause for the following reasons to-wit:

That in said action the plaintiff seeks to subject certain personal property to the payment of a debt alleged to be due from defendant Isaac M. Darnell, and to appoint a receiver over said personal property; said personal property so mentioned is located 1608 Central Avenue, City of Indianapolis, said County.

28 Petitioner shows to the court that with the exception of a small amount of goods in the attic of said house and a piano, which is the property of Elizabeth Kersting and Ella Dolph, that petitioner owns all of said property in said house at 1608 Central

Avenue and has continuously owned same since prior to the time of her marriage with Isaac M. Darnell, which was long prior to the beginning to this action, all of which she is ready and willing to verify.

That unless petitioner is admitted as a party defendant and allowed to plead herein that her property is liable to be taken and wasted to her irreparable injury and damage.

She therefore prays the court for an order admitting her as a party defendant and that she be allowed to set up her interest in said property and allowed to plead in said action as a party defendant.

EMMA DARNELL.

COCKROFT & ODLE.

CHAS. A. WEATHERS, *Att'ys.*

Ruling of Court Thereon.

To the admission of said Emma Darnell as party defendant the plaintiff objects, and the court overrules said objections and grants the prayer of said Application, and admits said applicant as a party defendant herein, and by leave of court — files her answer herein, as follows:

29 STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, November Term 1907.

No. 16391.

STATE OF INDIANA

vs.

ISAAC M. DARNELL, WALTER S. DARNELL, EMMA DARNELL.

Separate Answer of Emma Darnell.

Defendant, Emma Darnell, for her separate answer to the plaintiff's complaint herein says and alleges that she is the wife of her co-defendant, Isaac M. Darnell; that she is the second wife of said Isaac M. Darnell, and was married to him more than fifteen years ago. That she is the owner of all the personal property located in the residence at 1608 Central Ave., City of Indianapolis, with the exception of a piano and some personal property in the attic of said house. That she has owned the bulk of said property for more than fifteen years, being the owner of same at the time of her marriage to said Isaac M. Darnell, and that she has purchased and now owns some additional articles such as chairs, rugs and dishes, since her said marriage to said Darnell. That said Isaac M. Darnell her co-defendant, is not the owner of any of the personal property in said house at 1608 Central Ave., nor has he any interest therein, nor has he ever had any interest in said personal property so located.

Defendant further says that she is not indebted to the plaintiff
 30 in any sum whatsoever or on any account whatsoever, nor is
 she indebted to Marion County or to the City of Indianapolis
 in any sum whatsoever except the taxes upon said personal property
 as assessed for the year 1907.

Wherefore defendant prays a judgment for her costs and for all
 other proper relief.

COCKROFT & ODLE,
 CHAS. A. WEATHERS,
Attorneys for Defendant Emma Darnell.

To which ruling of the court the plaintiff objects and excepts.
 And now the petition for a receiver herein is submitted to the court,
 and defendant Emma Darnell files the separate affidavits of defend-
 ants Isaac M. Darnell and Walter S. Darnell, as follows:

STATE OF INDIANA,
County of Marion, ss:

In the Circuit Court of Marion County.

No. —.

STATE OF INDIANA
 VS.
 ISAAC M. DARNELL, WALTER S. DARNELL.

Affidavit of Isaac Darnell.

In the above cause comes the affiant, Isaac M. Darnell, and makes
 oath in due form of law that the personal property referred to in
 complaint by the State of Indiana as above is not owned by
 31 him, nor has he any right, title or interest in same, but the
 said personal property referred to in the house on Central
 Avenue No. 1608 in the City of Indianapolis, Indiana, is owned by
 Emma Darnell in her own right and she has full title, interest and
 control of said personal property, and in truth and fact, I, Isaac M.
 Darnell, own no personal property in the said County of Marion,
 Indiana, and own no real property in the said County whatever, the
 personal property belonging to my wife, Emma Darnell, in her own
 right, and the real property that I formerly owned when I lived
 in that County and State, I have sold transfer-ed and conveyed to
 W. S. Darnell for the said sum of \$8,500, as stated in the deed, and
 therefore I own no property of any description whatever in the
 County of Marion, State of Indiana.

ISAAC M. DARNELL.

Subscribed and sworn to before me this the 2 day of December,
 1907.

[SEAL.]

JAMES SMITH,
Notary Public.

My commission expires Dec. 4, 1909.

STATE OF INDIANA,
County of Marion, ss:

In the Circuit Court of Marion County.

No. —.

STATE OF INDIANA
vs.
ISAAC M. DARNELL, WALTER S. DARNELL.

Affidavit of Walter Darnell.

The affiant, Walter S. Darnell, makes oath in due form of law that he is the owner in fee of lot Number 208 and the north
32 half of lot number 207 in Allen and Root's north addition to the city of Indianapolis, in the said County of Marion, Indiana; that he purchased said lot and part of lot from Isaac M. Darnell, paying therefor the sum of \$8,500.00 and that he owes no taxes on said property and owes nothing in the way of taxes or otherwise to the said State of Indiana, and that therefore there is no reason why his property should be subjected to the payment of any taxes on account of any claim against him or his property so purchased and paid for at the date stated in the deed thereof made to him; that he is a non-resident of the State of Indiana and a resident citizen of the State of Tennessee, living in the city of Memphis thereof; that he owns no personal property in the said State of Indiana in the County of Marion.

WALTER S. DARNELL.

Subscribed and sworn to before me this the 2^d day of December, 1907.

[SEAL.]

JAMES SMITH,
Notary Public.

Commission expires Dec. 4, 1909.

Affidavit of Emma Darnell.

Emma Darnell, being duly sworn, upon her oath deposes and says that she is the second wife of Isaac M. Darnell, defendant in the case of the State of Indiana vs. Isaac M. Darnell and Walter S. Darnell now pending in the Circuit Court of Marion County, State of Indiana; that she is the owner of all the personal property now
33 situated in the residence at 1608 Central Avenue in the city of Indianapolis, Indiana, and that the same has belonged to her since prior to the time of her marriage afore mentioned; that none of the said personal property belongs to Isaac M. Darnell, but that there is a small amount of goods in the attic of the house

belonging to Miss Elizabeth Kersting, and that the piano in said house belongs to Mrs. Ella Dolph.

And further deponent saith not.

EMMA DARNELL.

STATE OF TENNESSEE,
County of Shelby, ss:

Subscribed and sworn to before me this the second day of December, 1907.

[SEAL.]

JOHN C. BROWN,
Notary Public.

My commission expires Jan. 1, 1909.

and now the court having examined said affidavit and heard the testimony herein, takes same under advisement."

34 And afterwards to-wit: on the 5th day of December, 1907, being the 4th judicial day of the December term, 1907, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Finding of Court on Separate Answer of Emma Darnell and Application for Receiver.

"Comes now the plaintiff the State of Indiana, by her counsel Morton S. Hawkins, Esquire, and comes also defendant Emma Darnell, by her counsel, Cockroft and Odle and Charles A. Weathers and the court being duly and sufficiently advised in the premises finds:

1st. That the plaintiff is not entitled to have a temporary receiver appointed to take charge of the personal property described in plaintiff's amended complaint, and located in the house at 1608 Central Avenue, City of Indianapolis.

2nd. That as to the rents and profits of the real estate located at 1608 Central Avenue, said City, the court finds that a temporary receiver should be appointed to take charge of the rents and profits of said real estate.

The court further finds that an emergency exists for the immediate appointment of a temporary receiver to take charge of the rents and profits of said real estate without notice to the owner of said real estate.

Finding of Court and Appointment of Receiver.

It is therefore considered, ordered and adjudged that James S. Cruse be and he is hereby appointed a temporary receiver of the following described real estate in the City of Indianapolis, said county, to-wit: Lot 208 and the North Half of Lot 207 in Allen and Root's North Addition to the City of Indianapolis, Marion County, Indiana, the same being located at 1608 Central Avenue said City and he is forthwith ordered to take

possession of the said real estate and hold the same until the further order of this court.

Said receiver shall have full power and authority to bring any suit that he may deem necessary in order to protect said property or to recover any property belonging to his said trust. He shall within ten days file an inventory of all the property over which he is appointed receiver; he shall also report at the time the rental value of said property. Said receiver is ordered to give bond in the sum of one thousand dollars (\$1000) payable to the State of Indiana, conditioned on the faithful performance of his duties as such receiver and after his said bond has been filed and approved he shall take possession of said property and a certified copy of this order shall be his authority in the premises.

And now comes said James S. Cruse and presents his bond with George W. Seibert, James W. Wands and Henry J. Wiethe as surety thereon which bond and security is approved by the court and is filed and is as follows:

STATE OF INDIANA

vs.

ISAAC M. DARNELL, WALTER S. DARNELL, and EMMA DARNELL.

Receiver's Bond.

We undertake to the State of Indiana that James S. Cruse, who has been appointed receiver in the above entitled cause, will faithfully discharge his duties as such receiver, and obey the orders of the court or judge therein made.

36

JAMES S. CRUSE.
GEORGE W. SEIBERT.
JAMES W. WANDS.
HENRY J. WIETHE.

Approved this 5th day of December 1907.

HENRY CLAY ALLEN,
Judge Marion Circuit Court.

And said James S. Cruse is now in open court sworn as such receiver, and this cause is continued for service of process on defendants Isaac M. and Walter S. Darnell.

And afterwards to-wit: on the 21st day of January, 1908, being the 14th judicial day of the January term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Filing of Proof of Publication.

"Comes the plaintiff and files proof of publication of notice to non-resident defendants Isaac M. Darnell and Walter S. Darnell, said notice and proof of publication thereof is as follows:

Legal Notice from the Indianapolis Commercial.

Morton S. Hawkins, Attorney.

1028 Law Building.

STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, in the State of Indiana.

No. 16391.

STATE OF INDIANA
vs.
ISAAC M. DARNELL et al.

37 Complaint to Set Aside Conveyance, Impress Property With
a Trust, Foreclose Lien and Receiver.

Be it known that on the 23rd day of November, 1907, the above named plaintiff, by its attorney, filed in the office of the clerk of the Circuit Court of Marion County, in the State of Indiana, its complaint against the above named defendants and the said plaintiff having also filed in said clerk's office the affidavit of a competent person, showing that said defendants, Isaac M. Darnell, Walter S. Darnell, are not residents of the State of Indiana and said cause is to set aside conveyance, impress property with a trust, foreclose lien and receiver, and that the last named defendants are necessary parties thereto and whereas said plaintiff having by endorsement on said complaint required said defendants to appear in said court and answer or demur thereto on the 22nd day of January, 1908.

Now therefore, by order of said court, said defendants last above named are hereby notified of the filing and pendency of said complaint against them and that unless they appear and answer or demur thereto at the calling of said cause on the 22nd day of January, 1908, the same being the fifteenth judicial day of a term of said court to be begun and held at the court house in the city of Indianapolis on the first Monday in January, 1908, said complaint and the matters and things therein contained and alleged will be heard and determined in their absence.

LEONARD M. QUILL, *Clerk.*

M. S. HAWKINS,
Attorney for Plaintiff.

38 STATE OF INDIANA,
Marion County, ss:

Personally appeared before the undersigned, a Notary Public in and for said County and State Ellen Russell who, being duly sworn,

upon her oath says, that she is a clerk for Central City Publishing Co., publishers of The Indianapolis Commercial, a newspaper of general circulation, printed and published in the English language, in the city of Indianapolis, in the County aforesaid, and that the notice, of which the attached is a true copy, was duly published in said paper for three insertions successively, the first of which publication was on the 25th day of November 1907 and the last on the 9 day of December 1907.

[SEAL.]

ELLEN RUSSELL.

Subscribed and sworn to before me, this 8 day of December 1908.

EZRA A. HARDIN,

Notary Public.

39 And afterwards to-wit: on the 22d day of January, 1908, being the 15th judicial day of the January term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Comes Cockroft and Odle attorneys and file and enter special appearance for defendants for purpose of objecting to jurisdiction of court:

STATE OF INDIANA,

County of Marion, ss:

In the Circuit Court of Marion County, November Term, 1907.

No. —.

STATE OF INDIANA

vs.

I. M. DARNELL, WALTER S. DARNELL.

Suit to Set Aside Conveyance, Impress Property With a Trust, Foreclose Lien and Receiver.

Special Appearance of Isaac Darnell and Walter Darnell.

To the Clerk of the Circuit Court of Marion County, Indianapolis, Indiana:

Please enter our appearance for Isaac M. Darnell and Walter S. Darnell, the defendants in the above styled cause, especially for the purpose of objecting to the jurisdiction and power of said court to compel the defendants named herein to appear and answer in said cause, and of objecting to the validity and constructive service attempted to be made by publication in the said cause so far as the same relates to these defendants and also in so far as by said publication it is sought to enable this court to obtain

jurisdiction over the persons and property of these defendants, or either of them, and for no other purpose.

COCKROFT & ODLE,
CHAS. A. WEATHERS,
Solicitors.

and now plaintiff files second amendment to complaint, as follows:

STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, January Term, 1908.

No. 16391.

STATE OF INDIANA
vs.
ISAAC DARNELL, WALTER S. DARNELL.

Plaintiff's Second Amendment to the Complaint.

Comes now the State of Indiana, the plaintiff in this cause and, before answer has been made by the defendants, and by special leave of court first had and obtained, files this its second
41 amendment to the complaint in the words and figures as follows, to-wit:

The value of the capital stock of the I. M. Darnell & Son Company so owned by Isaac M. Darnell, the defendant, for the years from 1900 to 1907, inclusive, was as follows:

1900	.....	\$89,300.00
1901	.....	89,300.00
1902	.....	89,300.00
1903	.....	49,300.00
1904	.....	49,300.00
1905	.....	49,300.00
1906	.....	49,300.00
1907	.....	49,300.00

JAMES BINGHAM,
Attorney General, State of Indiana.

D. J. HEFRON,
MERRILL MOORES,
MORTON S. HAWKINS,
Of Counsel,

also files second paragraph of complaint in these words:

42 STATE OF INDIANA,
Marion County, ss:

In the Circuit Court of Marion County, January Term, 1908.

No. 16391.

STATE OF INDIANA

vs.

ISAAC M. DARNELL, WALTER S. DARNELL.

Plaintiff's Second Paragraph of Complaint.

Comes now the plaintiff, State of Indiana, and files its second paragraph of complaint as follows, to-wit:

43 Second paragraph:

The State of Indiana brings this suit as *parens patriae* and trustee for all of the people of the said state and more particularly for the people of the said county, and for the use and benefit of the various political subdivisions of said county and alleges:

That continuously during the entire year of 1907, Cyrus J. Clark was the duly elected, qualified and acting Auditor of Marion County, in the said state.

The defendant Isaac M. Darnell was during the same time a resident of the city of Indianapolis, county and state aforesaid, and was a resident of the said city for each of the years from 1900 to 1907 inclusive, and received, accepted and enjoyed all of the benefits, privileges and immunities accruing to him as a resident of the said city, and maintained his domicile therein during such time.

That upon the 10th day of May, 1907, the said Clark, Auditor, placed upon the tax duplicates of Marion County an assessment of omitted property belonging to the said Isaac M. Darnell for each of the said years, and which property the said Darnell had unlawfully omitted and failed to return for taxation for each of the said years.

That the said property consisted of shares of the capital stock of a corporation called I. M. Darnell & Son Company, and the said Company was and is incorporated under the laws of the State of Tennessee, and is and has exercised no corporate functions and owned no property and has paid no taxes in the state of Indiana during any of the said years.

44 That the value of the stock so owned as aforesaid for each of the said years was as follows, to-wit:

1900	.....	\$89,300 00
1901	.....	89,300 00
1902	.....	89,300 00
1903	.....	49,300 00
1904	.....	49,300 00
1905	.....	49,300 00
1906	.....	49,300 00
1907	.....	49,300 00

That the assessment so made as aforesaid amounts to the sum of \$10,568.59, with a penalty, thereon of 16% and that there now appears to be due in delinquent taxes and penalties upon the tax duplicate of the said county and state the sum of \$—— from the said Isaac M. Darnell, and the said sum is now due and unpaid.

That the defendant Walter S. Darnell is the son of Isaac M. Darnell, and for a number of years has managed most or all of the business of the said Isaac M. Darnell. The said Isaac M. Darnell is a man 84 years of age.

Upon the 28th day of March 1907, the said Isaac M. Darnell was notified by registered letter that the proper taxing officials of Marion County aforesaid and persons employed by the said county for the discovery of omitted taxable property had discovered the said unlawful omissions made as aforesaid by Isaac M. Darnell and the said officers and employees of the said county then and there gave notice to the said Isaac M. Darnell that the said county and the different taxing bodies thereof intended to and would assert a claim against him for and on account of the taxes due by reason of said unlawful omissions; the said notice was receipted for by Walter S. Darnell and the said Walter S. Darnell had full notice then and there of the contents thereof.

On the date last mentioned the said Isaac M. Darnell was the owner in fee simple of real estate in Marion County in the said state, of the value of \$8,500.00, and the said property is described as Lot 208 and the North half ($\frac{1}{2}$) of Lot 207 in Allen & Root's North Addition to the City of Indianapolis in said county and state.

That after the said Isaac M. Darnell and Walter S. Darnell had received the said notice, and with full knowledge of the contents thereof, the said Isaac M. Darnell for the purpose and with the intention to cheat, hinder and delay this plaintiff and the said county, city and board of school commissioners and the other taxing bodies of the said county as aforesaid, and for the fraudulent purpose of preventing the collection of the taxes due from the said Isaac M. Darnell and of his said indebtedness, he did, by his certain warranty deed of the date April 25th, 1907, convey the said real estate to the said defendant, Walter S. Darnell, for the consideration as named in the deed, \$8,500.00. But plaintiff says that in truth and in point of fact no consideration was paid, or promised or agreed to be paid by the said defendant, Walter S. Darnell, for the said real estate, and that the said Walter S. Darnell did not in truth and in point of fact pay any consideration whatever therefor.

That the said Isaac M. Darnell, in order to defeat the collection of the said taxes, devised the fraudulent scheme of dividing up his property among his children and thereby defrauding plaintiff and those whom she represents. That in pursuance of said plan the said Isaac M. Darnell did convey all of his property to his different children and divide the same among them and the said Walter S.

Darnell received the said real estate as his portion of his father's property.

That at the time said conveyance was so made to the said defendant Isaac M. Darnell did not have, nor has he since had, nor has he now sufficient other property subject to execution with and out of which to pay the said taxes and indebtedness, and out of which said debt and claim can be made, and that he has no other property whatever subject to execution in the State of Indiana.

That the plaintiff attaches hereto and makes a part hereof an itemized statement of its claim and has marked the same, "Exhibit A."

That the said Walter S. Darnell holds the said property in trust for the said Isaac M. Darnell and the same is subject to the lien of the State of Indiana for the payment of the said taxes in full.

That the defendant, Walter S. Darnell, at the time the said deed was made to him of the said property had full knowledge of the claim of this plaintiff and those whom she represents, and the said Walter S. Darnell at the time that the said property was conveyed to him knew that the said taxes had accrued for the years 1900 to 1907, inclusive, and that the claim and lien for the said taxes would be asserted against the said real estate and that the said conveyance was made solely with the intent and object of defeating this plaintiff in the collection of the said taxes.

Although the assessment for the said property for each of the said years from 1900 to 1907 was not made until the 10th day of May, 1907, the lien for the said taxes accrued each year from 1900 to 1907 inclusive and each of the said years, as and when the said lien accrued, it became a lien upon the said real estate and could not be divested by any sale or transfer of the said real estate.

Wherefore, plaintiff prays that the property aforesaid be decreed to be held in trust by the said Walter S. Darnell for the use and benefit of the said Isaac M. Darnell and that the said trust be closed, the lien of the plaintiff be foreclosed against the said real estate and the same be sold to pay and satisfy plaintiff's claim. That the said conveyance be set aside and that the said deed be declared void, of no effect and fraudulent and that the said real estate be made subject to the payment of the said taxes and indebtedness and that the lien of the plaintiff be declared paramount to all others and that the same be foreclosed against the said real estate, that a temporary receiver thereof be appointed until the final hearing of this cause and at the final hearing that a permanent receiver be appointed to reduce the said real estate to money to pay plaintiff's claim.

That plaintiff have judgment for twelve thousand (\$12000.00) dollars, and for all other proper relief.

JAMES BINGHAM,

Attorney General, State of Indiana.

D. F. HEFRON,

MERRILL MOORES,

MORTON S. HAWKINS,

Of Counsel.

Def's Enter Special Appearance and File Plea in Abatement.

And afterwards to-wit: on the 11th day of February, 1908, being the 8th judicial day of the February term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Come the defendants by counsel and enter special appearance herein and file plea in abatement, as follows:

49 STATE OF INDIANA,
 County of Marion, ss:

In the Circuit Court of Marion County, November Term, 1907.

No. 16391.

STATE OF INDIANA
vs.
I. M. DARNELL, WALTER S. DARNELL.

Suit to Set Aside Conveyance, Impress Property With a Trust,
Foreclose Lien and Receiver.

Plea in Abatement.

Isaac M. Darnell and Walter S. Darnell, who are named as defendants in the above styled cause, appearing especially and solely to object to the jurisdiction and power of this Court to compel them, or either of them or both, to appear to answer in the aforesaid action, by protestation, not confessing or admitting all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, plead to the jurisdiction of this Court over them or either of them or over the real property described in said bill and sought to be reached as the property of one of these defendants and for cause of said plea in abatement say:

(I.)

50 That this Court ought not to compel either one or both of these defendants to appear or to answer in the aforesaid action because at the time of the commencement of the said suit the defendant, Isaac M. Darnell, was not a resident of the city of Indianapolis, Marion County, Indiana, and was not an inhabitant of said State, neither was he a citizen, thereof, nor found within the limits of said State, nor did he have agent, or place of business within the limits of said State nor did he have any property, real or personal, in said County of Marion and State of Indiana at said time.

(II.)

That this Court ought not to compel either one or both of these

defendants to appear or answer in the above action because that when the assessment and notification alleged to have been given to Isaac M. Darnell, one of the defendants, on the fourth day of May, 1907, and on the tenth day of May, 1907, and also on the 21st day of June, 1907, and previous thereto and even before the first day of March, 1907, the defendant, said Isaac M. Darnell, was not then a resident nor a citizen, nor an inhabitant of the said State of Indiana and had no personal property in said Marion County, Indiana. None of the property set out in the bill of complaint filed herein, as having been back assessed belonging to the said Isaac M. Darnell, was in the said County of Marion and state of Indiana at the time of the said alleged assessment by the County Auditor, Cyrus J. Clark, Auditor of Marion County, nor had said property been in said County for some time previous to March 1st 1907.

That some time prior to the first of March, 1907, the said Isaac M. Darnell removed from the State of Indiana and was no longer a citizen or resident thereof, nor an inhabitant of said State, nor did

he have any personal property, (shares of stock in any corporation located in the State of Tennessee), in the said County of Marion, State of Indiana, since leaving the said State, and that since leaving he has been a non-resident of that state and a resident of the State of Tennessee, and has had none of the shares of stock attempted to be assessed for back taxes in the said County of Marion, State of Indiana, since he left said State.

That since leaving said State, as before stated, on the 25th day of April 1907, the said Isaac M. Darnell sold, transferred and conveyed his real property in the said County of Marion, State of Indiana, described and referred to in the bill of complaint as lot 208 and the north half of lot 207 in Allen & Root's North Addition to the city of Indianapolis, in said County and State, to Walter S. Darnell for the sum of Eight Thousand Five Hundred Dollars (\$8,500.00) and made a warranty deed of the same to the said Walter S. Darnell for the full consideration as above stated, and since that time has had no real or personal property in the said County of Marion, State of Indiana.

IV.

That at that time the alleged back assessment of the shares of stock in the Isaac M. Darnell & Son Co., the defendant, Isaac M. Darnell, owned no such stock, not only in the said state of Indiana, but owned none anywhere in any state when the alleged assessments set out in the bill were made, in May or June 1907 nor some time previous thereto, and as before stated, had none of said stock in Marion County, State of Indiana, for some time prior to the first of March 1907, nor was he himself within the borders of said State nor an inhabitant or citizen thereof.

5.

That the said Walter S. Darnell had no personal or real property subject to taxation in the said County of Marion, State of Indiana, for the year 1907, but made the purchase of the said real property,

referred to in the bill and in the plea herein, from his father, Isaac M. Darnell, for the consideration therein stated, eight thousand five hundred dollars (\$8,500.00) and received a warranty deed therefor, and that there is no tax due on said place or real property and the same was purchased for the consideration as stated and the transaction was made at the time the deed shows on its face as registered in the said County of Marion.

(VI) That at the time the affidavit was made in this cause for publication in order to obtain service on these defendants, neither one of them was an inhabitant nor found in the said State of Indiana, nor within the jurisdiction of said Court, and neither one of them has even been served with any process, although there has been an attempted service to be made by publication under the laws of the State of Indiana; but as these defendants are informed and believe there can be no service obtained by publication as to them because the said Isaac M. Darnell was not a resident nor an inhabitant of the said State when the said assessment was made, or attempted to be made, back assessing personal property alleged to have belonged to him, nor at the time of the filing of the bill, nor did he own or have in said State any property of the character therein attempted to be assessed as set out in said bill on the first day of March

53 1907 or subsequent thereto nor did he have or possess any real property after the 25th day of April 1907, and that as to the said Walter S. Darnell he never had any property, either real or personal subject to taxation in the said State prior to the 25th day of April 1907 for that year or the previous year, nor was he a resident or inhabitant of the said State, nor did he owe any debt or obligation to the said State of Indiana.

Therefore these defendants, neither of them, is required or compellible to appear in response to said constructive service attempted to be had upon them by publication, nor do they or either of them accept or waive service thereof.

All of which matters and things these defendants aver to be true and are ready to maintain and prove, wherefore these defendants pray the judgment of this Honorable Court whether they ought to be required to appear in accordance with any writ, subpoena, or publication made as to them in said suit.

(Signed)

ISAAC M. DARNELL &
WALTER S. DARNELL,
COCKROFT & ODLE,
CHAS. A. WEATHERS,

Att'ys for Defendants.

Verification of Plea in Abatement.

STATE OF TENNESSEE,
County of Shelby, ss:

Subscribed and sworn to before me this 21st day of Jany., 1908.
[SEAL.] AUSTIN J. CALHOUN,

Notary Public.

Com. Ex. April 14, 1909.

54

Certificate of Clerk.

STATE OF TENNESSEE,
Shelby County:

I, Thos. B. Crenshaw, Clerk of the County Court of said County, do hereby certify that Austin J. Calhoun whose genuine signature appears to the hereto attached instrument is, and was at the time of signing the same, a Notary Public duly commissioned and qualified in and for said County, and that all his official acts as such are entitled to full faith and credit. And I further certify that the said Austin J. Calhoun is authorized by the laws of the State of Tennessee to administer oaths and take acknowledgment of Deeds.

His commission dates April 14, 1905 and expires April 14, 1909.

Witness my hand and seal of office, this 21st day of January A. D. 1908.

[SEAL.]

T. B. CRENSHAW, *Clerk.*
 By JOHN SPEED, *D. C.*

And plaintiff is ruled to reply thereto."

And afterwards to-wit: on the 6th day of *of* March, 1908, being the 5th judicial day of the March term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Come the parties and plaintiff files demurrer to the answer in abatement herein, as follows:

55 STATE OF INDIANA,
Marion County:

Circuit Court, June Term, 1908.

STATE OF INDIANA
 vs.
 ISAAC M. DARNELL et al.

Demurrer to Plea in Abatement.

The plaintiff demurs to the answer in abatement filed herein by the defendant upon the ground.

That said answer does not state facts sufficient to constitute a cause of defense.

JAMES BINGHAM,
Att'y Gen'l, Attorney for Plaintiff.

HEFRON & HARRINGTON & HAWKINS,
Of Counsel.

And afterwards to-wit: on the 7th day of September, 1908, being the 1st judicial day of the September term, 1908, of said court,

before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Ruling on Demurrer.

"Come the parties and the court being advised in the premises sustains the demurrer to the answer in abatement herein, and defendants except to said ruling and are now by the court ruled to plead over."

And afterwards to-wit: on the 22d day of September, 1908, being the 14th judicial day of the September term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

56 "Come the parties by their respective attorneys and defendants now file verified petition for removal of this cause to the United States Circuit Court for the District of Indiana, said petition is in the words and figures following, to-wit:

STATE OF INDIANA.

County of Marion, ss:

In the Circuit Court of Marion County.

No. 16391.

STATE OF INDIANA

vs.

ISAAC M. DARNELL, WALTER S. DARNELL.

Verified Petition on Removal.

To the Honorable Judge of the Circuit Court of Marion County:

1. Your petitioners respectfully show that they are the defendants in the above entitled cause, and that the matter and amount involved in said cause exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars.

2. Your petitioners further show that said suit is of a civil nature, and that in said suit there is a controversy which is wholly between citizens of different States, to-wit: between your petitioners, Isaac M. Darnell and Walter S. Darnell and the said plaintiff, the State of Indiana, which can be fully determined as between them; that your petitioners and each of them at the time of the commencement of said suit were and still are citizens and residents of the State of Tennessee and non-residents of said State of Indiana, and that the said State of Indiana is plaintiff, that said controversy is of

57 the following nature, to-wit:

The State of Indiana is suing your petitioners, Isaac M. Darnell and Walter S. Darnell, asking the Court to set aside a certain transfer of real estate in the city of Indianapolis, Ind., made on April 25th, 1907, so that said property may be subjected to the

payment of certain taxes all alleged to be due from one of your petitioners, to-wit: Isaac M. Darnell, on certain stock in a foreign corporation, which the said Isaac M. Darnell is supposed to have owned while he, the said Isaac M. Darnell, was a citizen of Indiana, although said taxes had not been levied and were not a lien on said property at the time of the said transfer and that said taxes so claimed did not grow out of and were not against the real estate mentioned in said suit; that your petitioners and the said plaintiff are both actually interested in said controversy.

3. Your petitioners further show that the taxes claimed to be due from defendant, Isaac M. Darnell, as mentioned in said suit, are claimed under and by virtue of the provisions of a certain Indiana Statute providing for the taxation of shares of stock in foreign corporations owned by citizens of Indiana, even though the corporation itself has paid taxes on the full amount of its capital stock and other property in its home State.

4. Your petitioners further state and show that by the laws of the State of Indiana, the same character or class of property sought to be subjected to taxation by this suit through the agents and officers of said State, is exempted from taxation by the terms of the statutory laws of said State which provide that shares of stock held and owned in corporations of the State of Indiana, all the property of which is taxable to the corporations themselves, shall not be assessed to the shareholder, and petitioners insist that said provision of the Statute of the State of Indiana is a discrimination against the resident citizens of said State, who may own shares of stock in said foreign corporations located in other States, when it is sought to force them to pay a tax on their shares of stock in said foreign corporations even though all the property of such foreign corporations is taxable to the corporations themselves where located and also that this provision of said Statute violates Article 14, Section 1 of the amendment to the Constitution of the United States and hence is null and void, and also violates the Commerce clause of the Constitution of the United States in Art. 1 and Section-8 and 9 thereof.

5. Petitioners further allege that this form of taxation in its very nature and effect, as provided under the Statute laws of the State of Indiana, is double taxation and the classification of this species of property, to-wit: shares of stock in domestic and foreign corporations, as provided by the said statutes of the State of Indiana for the purpose of taxation, is manifestly arbitrary, discriminating, unequal and unjust and operates to abridge the privileges and immunities of the defendant, I. M. Darnell, a citizen of the United States, and denies him as such citizen within the jurisdiction of the United States, the equal protection of the laws of the United States guaranteed to him and therefore the legislative power of said State of Indiana *exercised* in the enactment of said Statutory laws of the said State under the guise of taxation takes property without due process of law and violates and contravenes Article 14 and Section 1 of the Amendments to the Constitution of the United States and hence is unconstitutional, null and void.

6. Your petitioners offer herewith a bond, with good and sufficient surety in the penal sum of One Thousand Dollars, conditioned for their entering in the Circuit Court of the United States for the District of Indiana, on the first day of next session of said Court, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed thereto, and do or cause to be done such other appropriate acts as, by the Acts of Congress approved March 3d, 1875, and other Acts of Congress, are required to be done upon removal of a suit into the United States Circuit Court from a State Court.

Your petitioners, therefore, pray this honorable Court to proceed no further herein, except to make an order of removal as required by law, and to accept the said surety and bond, and to cause the record in this case to be removed into said Circuit Court of the United States within *the* and for the District of Indiana, according to the Statute in such case made and provided.

And your petitioners will ever pray, etc.

ISAAC M. DARNELL,
WALTER S. DARNELL.

Petitioners.

COCKROFT & ODLE,
CHARLES A. WEATHERS,
Attorneys for Defendants.

60

Verification.

STATE OF TENNESSEE,
County of Shelby, ss:

Isaac M. Darnell, being duly sworn, deposes and says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes — to be true.

ISAAC M. DARNELL.

Subscribed and sworn to before me this the 2nd day of December, 1907.

[SEAL.]

AUSTIN J. COLLEONN,
Notary Public.

Commission expires April 14th, 1909.

Verification.

STATE OF TENNESSEE,
County of Shelby, ss:

W. S. Darnell, being duly sworn, deposes and says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his

own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes — to be true.

WALTER S. DARNELL.

Subscribed and sworn to before me this the 2nd day of December, 1907.

[SEAL.]

AUSTIN J. COLLEONY,
Notary Public.

Commission expires April 14th, 1909.

61

Bond Tendered.

And the said defendants at the time of filing said petition tender to the court their bond in the sum of Five Hundred Dollars with the United States Fidelity and Guaranty Company of Baltimore, Maryland as surety thereon."

And afterwards to-wit: on the 23d day of September, 1908, being the 15th judicial day of the September term, 1908, of said Court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Come the parties and plaintiff files motion to reject the petition for removal herein, as follows:

STATE OF INDIANA,
Marion County:

Circuit Court, September Term, 1908.

STATE OF INDIANA
vs.
ISAAC M. DARNELL et al.

Motion to Reject Petition for Removal.

Comes now the plaintiff and moves the court to strike out and reject the petition for a removal of the cause to Circuit Court of the United States, filed by the defendants herein for the reasons.

First. Because it is not shown by such petition that there is any diverse citizenship as to the parties to the action.

Second. Because it is not shown or averred that any federal question is involved in the issue.

Third. Because it is not shown nor does it appear, that there is any question involved in the issues, arising under the constitution, laws or treaties of the United States.

JAMES BINGHAM,
Att'y Gen'l, Attorney for Plaintiff.

HEFRON & HARRINGTON,
HAWKINS,
Of Counsel.

62

Ruling of Court Thereon.

And afterwards to-wit on the 3d day of October, 1908, being the 24th judicial day of the September term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Come the parties and the court being advised in the premises denies the petition for removal. To which ruling of the court defendants except."

And afterwards to-wit: on the 10th day of October 1908, being the 6th judicial day of the October term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

"Come the parties and defendant files demurrer to the complaint herein, as follows:

STATE OF INDIANA,
Marion County, ss:

In the Marion Circuit Court.

STATE OF INDIANA
vs.
ISAAC M. DARNELL, WALTER S. DARNELL.

Demurrer to Complaint.

The defendants herein, Isaac M. Darnell and Walter S. Darnell, jointly and severally demur to plaintiff's complaint and for cause of demurrer allege:

I. That said complaint does not state facts sufficient to constitute a cause of action against them or either of them.

63 II. That it appears upon the face of the complaint that the court has no jurisdiction of the person of either of the defendants as each of them were at the time of the filing of the complaint and are now non-residents of the State of Indiana.

III. That it appears upon the face of the complaint that the court has no jurisdiction of the subject matter of the action for the reason that the taxes sought to be collected are alleged to have accrued against stock in foreign corporation now held and owned by a non-resident of the State of Indiana, and that no property sought to be subjected to the payment of the alleged taxes was seized or attached and hence was not and is not now within the jurisdiction of the court.

IV. That it appears upon the face of the complaint that there could be no lien against any property owned by either of the defendants for the reason that the extension on the tax duplicates for the back assessment is necessary to create a lien as prior to that time there could only exist a right to tax; and not until molded by the

forms of law into a fixed charge was it susceptible of demand and exact payment:

V. That no cause of action exists in favor of the plaintiff for the reason that it is not shown that before the filing of the complaint a judgment and an execution had been issued against the property of the defendant or defendants herein to the Sheriff of Marion County and that that execution had been returned by the Sheriff unsatisfied.

VI. That it appears upon the face of the complaint that the back assessment of the taxes sought to be collected was made by the officers of Marion County in pursuance to a Statute of this State which provides for the taxation of shares of stock in a foreign corporation, owned by inhabitants of this State, regardless of whether the property of the corporation was taxed in a foreign State or not and which said Statute at the same time exempted or exempts from taxation shares of stock of like nature and character in a domestic corporation and that this is an arbitrary discrimination and in violation of Article 1, Section XIV of the amendments to the Constitution of the United States.

VII. That it appears upon the face of the complaint that the back assessment of the taxes sought to be collected was made by the officers of Marion County in pursuance to a Statute of the State which provides for the taxation of shares of stock in a foreign corporation, owned by inhabitants of this State, regardless of whether the property of the corporation was taxed in a foreign State or not and which said Statute at the same time exempted or exempts from taxation shares of stock of like character and nature in a domestic corporation and that this is an arbitrary discrimination against stock having its origin in a foreign State and in violation of the Commerce clause, Section 8, Article 1, of the Constitution of the United States.

VIII. That the Statute under which plaintiff sues the defendant herein, as construed by the Supreme Court of Indiana in *Hasely vs. Ensley*, 82 N. E. Rep. 809-12 where it says: "*a clear interest and purpose was manifested on the part of the Legislature to distinguish between shares of stock in a foreign corporation and shares of stock in a domestic corporation is unconstitutional, null and void and openly and notoriously violates the commerce clause of the Federal Constitution Sec. 8, Article 1.*"

Wherefore defendants, and each of them, pray judgment that the action be dismissed, and that they and each of them go hence without day and recover costs and for all other and proper relief.

COCKROFT & ODLE,
CHAS. A. WEATHERS,

Attorneys for Defendants.

And afterwards to-wit: on the 20th day of October, 1908, being the 14th judicial day of the October term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Ruling of Court on Demurrer.

"Come the parties and the court overrules defendants' demurrer to the complaint herein. To which ruling the defendant- excepts and *is* ruled to answer."

And afterwards to-wit: on the 26th day of October, 1908, being the 19th judicial day of the October term, 1908, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Come again the parties and the demurrer of the defendants to the plaintiff's complaint having been overruled, and the defendants failing and refusing to answer said complaint or plead further, the court now renders judgment on the demurrer.

Judgment.

And now this cause is submitted to the court for finding
66 and judgment, and the court after being sufficiently advised in the premises finds for the plaintiff and that the allegations of its complaint are true and that there is due and owing to the plaintiff from the defendant, Isaac M. Darnell, on the account sued on, the sum of twelve thousand two hundred and seventy one (\$12,271.00) dollars.

And the court further finds that the deed from the defendant, Isaac M. Darnell to the defendant Walter S. Darnell, for the property described and set out in the complaint, was executed with the fraudulent intent to cheat hinder and defraud the creditors of the defendant, Isaac M. Darnell, including the plaintiff, and that said deed is fraudulent and void as to the plaintiff and the property described therein is subject to sale for the satisfaction of plaintiff's claim.

It is therefore ordered and adjudged by the court that the plaintiff recover of and from the defendant, Isaac M. Darnell, the said sum of twelve thousand two hundred and seventy one (\$12,271.00) dollars together with his costs and charges in this behalf laid out and expended.

And it is further ordered and decreed by the court that the deed executed by the defendant, Isaac M. Darnell, conveying to the defendant Walter S. Darnell, the property described in the complaint, is fraudulent and void and the same is hereby set aside and held for naught, and said property to-wit: Lot number two hundred and eight and the North half of lot two hundred and seven, in Allen and Root's North Addition to the city of Indianapolis, Marion County State of Indiana is hereby ordered sold for the satisfaction of
this judgment.

67 And it is further ordered by the court that execution first issue on this judgment against the property of the defendant, Isaac M. Darnell, and in case the amount due the plaintiff can

not be made out of the property of said defendant, then that the property conveyed to the defendant, Walter S. Darnell, and above described, be sold as other lands are sold on execution to satisfy plaintiff's said claim.

And afterwards on the same day, before the same Hon. Judge of said Court, the following proceedings were had herein viz:

Motion to Vacate and Set Aside Judgment.

"Come the parties and the defendants and each of them separately and severally file motion to vacate and set aside the judgment herein, as follows:

STATE OF INDIANA,
County of Marion, ss:

In the Marion Superior Court.

No. 16391.

THE STATE OF INDIANA
vs.
ISAAC M. DARNELL & WALTER S. DARNELL.

Motion to Set Aside Judgment.

The defendants in the above entitled cause and each of them separately and severally, now moves the Court to vacate and set aside the judgment heretofore entered upon the records of said Court, upon the following grounds, namely:

68 1st. That the judgment entered by the Court is contrary to law.

2nd. That the Court has no jurisdiction of the cause of action set forth in either paragraph of the complaint of the plaintiff herein.

3rd. That the court has no jurisdiction of the subject matter set forth in either paragraph of said complaint.

4th. That the Court has no jurisdiction over the defendants or either of them.

5th. That that portion of the statute under which the proceedings herein were taken is unconstitutional and void being a violation of Section eight (8) and nine (9) of Article One (1) of the Constitution of the United States.

6th. That the judgment of the Court herein is in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendants and each of them separately and severally of their property without due process of law and denies to them the equal protection of the laws, they having been served by publication only and never having entered a general appearance.

7th. That the judgment of the Court herein is null and void for the reason that the Court has no jurisdiction of the person of either of the defendants as each of them were at the time of the filing of the complaint and at all times thereafter and are now non-residents of the State of Indiana, and service was had on these defendants by publication only; and no general appearance has been entered by them.

COCKROFT & ODLE,
CHAS. A. WEATHERS,
Att'ys for Defendants.

69

Ruling of Court Thereon.

And the court overrules said motion to which ruling of the court each of the defendants at the time except-.

Come the parties and the defendants and each of them separately and severally file motion to modify the judgment of the court herein, as follows:

STATE OF INDIANA,
County of Marion, ss:

In the Marion Superior Court.

No. 16391.

THE STATE OF INDIANA

vs.

ISAAC M. DARNELL & WALTER S. DARNELL.

Motion to Modify Judgment.

The defendants in the above entitled cause and each of them separately and severally, now move the Court to modify the judgment of the Court herein as follows:

By striking out that portion of the judgment which reads as follows:

"It is therefore ordered and adjudged by the Court that the Plaintiff recover of and from the defendant, Isaac M. Darnell, the said sum of twelve Thousand Two Hundred and Seventy-one (\$12,271.00) Dollars together with his costs and charges in this behalf laid out and expended."

For the reason that it is in violation of the Fourteenth (14th) Amendment to the Constitution of the United States in that
70 it deprives the defendant, Isaac M. Darnell of his property without due process of law and denies him the equal protection of the law, said defendant having been served with process by publication only and not having appeared voluntarily or entered a general appearance.

COCKROFT & ODLE,
CHAS. A. WEATHERS,
Att'ys for Defendants.

Ruling of Court Thereon.

And the court overrules said motion, to which ruling of the court each of the defendants at the time except.

Appeal Prayed. Appeal Granted. Approval of Bond.

And now the defendants pray an appeal to the Supreme Court of the State of Indiana, which said appeal is granted on the condition the defendants file an appeal bond in the sum of Fifteen Thousand Dollars within thirty days with the United States Fidelity & Guaranty Company of Baltimore, Maryland as surety thereon, which security is approved by the Court."

And afterwards to-wit: on the 18th day of November, 1908, being the 15th judicial day of November term, 1908, of said court, before the Hon. Charles Remster, Judge thereof, the following proceedings were had herein, viz:

"Come the parties and defendants file appeal bond herein, as follows:

THE STATE OF INDIANA

vs.

ISAAC M. DARNELL, WALTER S. DARNELL.

Appeal Bond.

Know all men by these presents, that we, Isaac M. Darnell, 71 Walter S. Darnell, and United States Fidelity and Guaranty Company, are held and firmly bound unto The State of Indiana in the penal sum of Fifteen Thousand (\$15,000) Dollars, for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of November, 1908.

The condition of the above obligation is such that whereas, heretofore, to-wit, on the 26th day of October, 1908, the said The State of Indiana in the Marion Circuit Court, recovered a judgment against the said Isaac M. Darnell and Walter S. Darnell for the sum of Twelve Thousand Two Hundred Seventy-one (\$12,271) Dollars in damages, and costs of suit, from which said judgment of said Marion Circuit Court the said Isaac M. Darnell and Walter S. Darnell have taken an appeal to the Supreme Court of Indiana.

Now if the said Isaac M. Darnell and Walter S. Darnell shall and will duly prosecute said appeal and abide by and pay the judgment and costs which may be rendered against them or either of

them, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

Approved November 18, 1908.

ISAAC M. DARNELL,
WALTER S. DARNELL.

By CHARLES A. WEATHERS.

Their Attorney in Fact.

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THE UNITED STATES FIDELITY AND
GUARANTY COMPANY OF BALTIMORE,
MARYLAND.

[SEAL.]

By JOHN E. MESSICK, *Att'y in Fact.*

Approval of Judge.

CHARLES REMSTER,
Judge Marion Circuit Court.

73 . STATE OF INDIANA,
County of Marion, ss:

Marion Circuit Court.

No. 16391.

THE STATE OF INDIANA

vs.

ISAAC M. DARNELL et al.

Precipe.

The clerk will prepare and certify a full, true, and complete transcript of the proceedings, entries, papers on file, and judgment in the above entitled cause, to be used in appeal to the Supreme Court.

CHAS. A. WEATHERS,
JOSEPH F. COWERN,

Attorneys for Isaac M. Darnell & Walter S. Darnell.

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Clerk's Certificate.

STATE OF INDIANA,
County of Marion, ss:

I, Leonard M. Quill, Clerk of the Marion Circuit Court within and for the county and state aforesaid, do hereby certify that the above and foregoing transcript contains full true and correct copies of all the papers and entries of proceedings had in said cause, as appears from the records and files in my office, and as required by the above and foregoing precipe.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in the City of Indianapolis, this 16th day of December, 1908.

[SEAL.]

LEONARD M. QUILL,
Clerk Marion Circuit Court.

75 STATE OF INDIANA,
In the Supreme Court:

ISAAC M. DARNELL, WALTER S. DARNELL, Appellants,
 vs.
 STATE OF INDIANA, Appellee.

Assignment of Errors.

The appellants in the above entitled cause say there is manifest error in the foregoing record in this:

1. The court erred in sustaining the demurrer to the answer in abatement.

2. The court erred in denying the appellant's petition for removal of cause.

3. The court erred in sustaining the motion of appellee to strike out and reject the petition for removal of cause.

4. The court erred in overruling the demurrer to the complaint.

5. The Court erred in overruling the appellant's motion to vacate and set aside the judgment entered on demurrer.

6. The court erred in overruling the motion to vacate and set aside the judgment.

7. The court erred in overruling appellant's motion to modify the judgment as entered upon demurrer.

76 8. The court erred in overruling the motion to modify judgment.

Wherefore, appellants pray that the judgment of the Marion Circuit Court in said cause be reversed and set aside.

COCKROFT & ODLE,
 CHAS. A. WEATHERS,
 JOSEPH F. COWERN,

Attorneys for Appellants.

Filed Dec. 30, 1908.

EDWARD V. FITZPATRICK, *Clerk.*

77 And Afterwards to-wit, on the 29th day of January, 1909, the same being the 59th judicial day of the November Term 1908, of said Supreme Court, the following further pleas and proceedings were had in said cause to-wit:

Come the parties by their counsel and this cause is submitted to the Court for judgment and decree as provided by the Act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Court adopted in relation thereto.

And afterwards to-wit, on the 12th day of March, 1909, the same being the 95th judicial day of said November Term, the following further pleas and proceedings were had herein.

Come now the appellants by counsel and file their brief in the words and figures following: (here insert.)

And on the same the day appellants by counsel file their request for an oral argument herein in the words and figures following: (here insert.)

And afterwards to-wit, on the 10th day of April, 1909, being the 130th judicial day of the said November Term, the following further pleas and proceedings were had herein.

Comes now the appellee by counsel and files its brief in the words and figures following: (here insert.)

And afterwards on the 4th day of May, 1909, being the 140th judicial day of said November Term, the following further pleas and proceedings were had herein:

Comes now the appellee by counsel and files its petition to advance in the words and figures following: (here insert.)

78 And afterwards, on the same day, the following further pleas and proceedings were had herein.

Come now the appellants by counsel and file their reply brief in the words and figures following: (here insert.)

And afterwards to-wit, on the 11th day of May, 1909, being the 146th judicial day of said November Term, the following further pleas and proceedings were had herein:

Come now the parties by counsel and the court being fully advised in the premises denied the appellee's petition to advance heretofore filed in said cause.

And afterwards to-wit, on the 2nd day of November, 1909, being the 140th judicial day of the May Term, 1909, of said court, the following further pleas and proceedings were had herein:

The court being sufficiently advised in the premises sets the above cause for oral argument on the 10th day of December, 1909, and notices thereof were duly issued.

And afterwards to-wit, on the 4th day of February, 1910, the same being the 65th judicial day of the November Term 1909 of said Court, the following further pleas and proceedings were had herein:

Come the parties by their attorneys and the court being sufficiently advised in the premises gives its opinion and judgment as follows, pronounced by Montgomery, J., which said opinion is in the words and figures following, towit:

79 And afterwards to-wit, on the 17th day of March, 1910, the same being the 100th judicial day of said November Term, the following further pleas and proceedings were had herein:

Come the parties by counsel and file their petition to substitute parties in the words and figures following: (here insert.)

And afterwards to-wit, on the 30th day of March, 1910, being the 111th judicial day of said November Term, the following further pleas and proceedings were had herein:

Come the appellants by counsel and file their petition for rehearing with brief thereon in the words and figures following: (here insert.)

And afterwards to-wit, on the 21st day of April, 1910, being the 130th judicial day of said November Term, the following further pleas and proceedings were had herein:

The court being sufficiently advised in the premises overruled the petition for rehearing heretofore filed by appellants and denied their motion to substitute parties herein.

80 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1909.

On the 4th day of February, 1910, being the 65th Judicial day of said November Term, 1909.

Hon. John V. Hadley, Chief Justice; Hon. Leander J. Monks, Hon. Quincy A. Myers, Hon. James H. Jordan, Hon. Oscar H. Montgomery, Justices.

No. 21379.

In the Case of

ISAAC M. DARNELL et al.

vs.

STATE OF INDIANA.

Appealed from the Marion Circuit Court.

(16391.)

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Montgomery, J.

81 This is a suit in equity brought by the state in its capacity as a sovereign and as parens patriae and trustee for all the people and the political subdivisions of the state, to recover of Isaac M. Darnell \$12000 for taxes on property omitted from taxation, to set aside a fraudulent conveyance of real estate, and to foreclose the state's lien for taxes against such real estate, and for the appointment of a receiver. Emma Darnell voluntarily appeared and on application was made a party defendant, and thereupon made claim of ownership to certain personal property mentioned in the complaint. This claim together with the application for a receiver was submitted to the court upon affidavits. The personal property was awarded to Mrs. Darnell, and a receiver was appointed to take and hold possession of the real estate in controversy during the litigation.

Appellee caused an affidavit to be filed with its complaint, alleging that appellants Isaac M. Darnell and Walters S. Darnell were not residents of this state, and that the action was to enforce a lien upon real estate in Marion County and for possession

of real estate within the state of Indiana, in the language of the provisions of the third subdivision of section 322 Burns' Statutes 1908. The court upon this affidavit ordered the publication of non resident notice as provided in said section requiring appellants to appear and answer to the complaint on January 22, 1908. In response to this notice, which was duly given and proof thereof made and filed in the cause, appellants appeared specially and filed what it termed a plea in abatement, to which appellee's demurrer for insufficient facts was sustained. A petition to remove the cause to the Federal Court was filed by appellants, which petition was rejected, and thereupon appellants jointly and severally demurred to the complaint, on the grounds that the facts therein alleged were insufficient to constitute a cause of action, and that the court had no jurisdiction over the persons of the defendants or the subject matter of the action. This demurrer was overruled, and appellants declining to plead further, judgment was rendered in favor of the state in accordance with the prayer of the complaint. Motions to modify and to vacate the judgment were subsequently made and severally overruled.

It is averred upon appeal that the court erred in, (1) sustaining appellee's demurrer to the plea in abatement, (2) denying the application for removal to the Federal Court, (3) overruling appellant's demurrer to the complaint, overruling the motions (4) to vacate, and (5) to modify the judgment.

The complaint, in brief, charged, that Isaac M. Darnell was a resident of, and maintained his domicile in the City of Indianapolis, Marion County, Indiana, for each of the years from 1900 to 1907 inclusive, and that during each of said years he was the owner of shares of capital stock in a corporation called I. M. Darnell & Son Company, which was incorporated under the laws of the State of Tennessee, and which had exercised no corporate functions, owned no property, and paid no taxes, in this state, during any of said years, and that the value of the stock owned by said Isaac M. Darnell as aforesaid, for each of said years was as follows:—1900, \$89300; 1901, \$98300; 1902, \$89300; 1903, \$49300; 1904, \$49300; 1905, \$49300; 1906, \$49300; 1907, \$49300. That said Isaac M. Darnell unlawfully omitted and failed to list and return said property for taxation for each of said years; and that on May 10th, 1907, the Auditor of Marion County duly placed said property on the tax duplicate of said county, and computed and extended taxes thereon for each of said years and charged the same to said Darnell as taxes on omitted property to the aggregate amount of \$10,568.59, which amount with delinquent penalties of 16% thereon, remains upon said duplicate and is owing by said Darnell, due and unpaid.

That appellant Walter S. Darnell is the son of said Isaac M. Darnell, and for a number of years has managed the business of his father who is eighty four years of age; and, on March 28th, 1907, the taxing officers of Marion County gave notice by registered letter to said Isaac M. Darnell, that they intended to and would assert a claim against him for said omitted taxes, which letter and notice were received for by said Walter S. Darnell, who then and there had full

notice of the contents thereof; that at the time of receiving said notice said Isaac M. Darnell was the owner in fee simple of certain real estate, described, in the city of Indianapolis of the value of \$8500 and thereafter said Isaac M. Darnell with intent to cheat, hinder and delay appellee, said County, City, Board of School Commissioners and others, and for the fraudulent purpose of preventing the collection of said indebtedness and taxes due from him, did on

April 25th, 1907, by warranty deed convey said real estate
83 to said Walter S. Darnell for a stated consideration of \$8500,

but in fact no consideration was paid, promised or agreed to be paid for such conveyance. That for the purpose of defeating the collection of said taxes, said Isaac M. Darnell fraudulently divided and distributed all his property among his children, and since the conveyance of said real estate has had no property subject to execution in this State. That said property is held by Walter S. Darnell in trust for Isaac M. Darnell and is subject to the lien of the state for the payment of said taxes in full.

The plea in abatement in substance alleged, that at the commencement of this action Isaac M. Darnell was not a resident of this State, and owned no property therein, that prior to March 1, 1907, he removed from Indiana, and at the time the alleged assessment was made he was a non-resident of this state, and none of the property assessed was within the state or owned by him; that Walter S. Darnell had no real or personal property in Marion County subject to taxation for the year 1907, and that the purchase and conveyance of said real estate were made for the consideration stated in the deed; and, that at the time the affidavit was made upon which the publication of notice was ordered, neither Isaac M. Darnell nor Walter S. Darnell was a resident, or within the jurisdiction of this state.

This plea is clearly insufficient to abate the action. It is in effect a categorical denial of the jurisdiction of the court, and of the truth of material averments of the complaint. The allegation that appellants are non-residents is of no consequence, since that facts appears from the complaint, and jurisdiction over the cause was acquired in the way provided by statute in such cases. The regularity and sufficiency of the procedure to acquire jurisdiction are not challenged. The denial that the property assessed against Isaac M. Darnell was subject to taxation for the year 1907 goes to the merits, and if true would constitute a partial answer in bar rather than in abatement. The court did not err in sustaining appellee's demurrer in this plea. *Sloan v. Lowder* 23 Ind. App. 118, 321.

It is further contended, that the demurrer to the answer in abatement searched the record, and should have been carried back and sustained to the complaint. This view of the law is erroneous, and such a demurrer does not search the record. *State v. Roberts*,
84 166 Ind. 585, 589; *Goldsmith v. Chipps*, 154 Ind. 28; *Indiana*
etc. *R. Co. v. Foster*, 107 Ind. 430; *Price v. Grand Rapids etc.*
R. Co., 18 Ind. 137; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515; 6 Ency.
Pl. & Pr. 332.

The petition for removal of the cause to the Federal Court was rightly denied, for the reasons, that there was no diversity of citizen-

ship, or showing that a federal question, or question arising under the Constitution, laws or treaties of the United States, was involved.

A state is not a citizen, and the cause was not removable on the ground of diversity of citizenship. 4 Fed. Statutes Annotated p. 290, Postal Tel. etc. Co. v. Alabama, 155 U. S. 482; Indiana v. Tolleston Club, 53 Fed. 18; Indiana v. Allegheny Oil Co. 85 Fed. 870. The complaint did not raise any question arising under the Constitution, Laws or Treaties of the United States, and the cause was not transferable on such grounds. 4 Fed. Statutes Annotated, p. 314; Arkansas v. Kansas etc. Coal Co. 183 U. S. 188; Tennessee v. Union etc. Bank 152 U. S. 454; Germania Ins. Co. v. Wisconsin, 119 U. S. 473; Ames v. Kansas 111 U. S. 449.

The capacity of the state to maintain this suit is not challenged by the demurrer, and it is well settled that the courts are open to the state as a litigant, both by virtue of its corporate rights and in its sovereign capacity. State v. Ohio Oil Company, 150 Ind. 21, 27.

The owner of property on the first day of March is personally liable for the taxes on such property for that year. Millikan v. Reeves, 71 Ind. 281. Funk v. State ex rel. 166 Ind. 455.

A tax is a debt for the collection of which a creditor's bill may be brought. State Georgia Company, 112 N. C. 34, 19 L. R. A. 485. Albany County v. Durant 9 Paige's Ch. (N. Y.) 182; People v. Weber, 164 Ill. 412; McEnery v. Reed, 23 Iowa, 410; United States v. Pacific R. R. Co. 4 Dillon (U. S.) 66; State v. Duncan 3 Lea (Tenn.) 679.

"The lien of the state for all taxes for state, county, school, road, or township purposes, shall attach on all real estate, on the first day of March annually, and such lien shall be perpetual for all taxes due from the owner thereof, which have heretofore accrued or shall hereafter accrue, with interest and penalties in each case until payment; which lien shall in no wise be affected by any sale or transfer of any such real estate." Section 10343 Burns' Statutes 1908.

It is further provided that, "all the property both real and personal, situated in any county, shall be liable for the payment of all
85 taxes, penalties, interest and costs charged to the owner thereof in such county, etc." Section 10344 Burns' Statutes 1908.

The assessment of omitted property as shown in the complaint was made in pursuance of express statutory authority; and the pertinent part of the statute reads as follows:

"Whenever the county auditor shall discover or receive credible information * * * that any personal property has from any cause been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto with the proper valuation, and charge such property and the owner thereof, with the proper amount of taxes thereon; to enable him to do which he is invested with all the powers of assessors under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, de-

scribing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice and show cause, if any, why such property should not be added to the tax duplicate, etc." Section 10310 Burns' Statutes 1908.

In construing this statute in the case of *Buck v. Miller*, 147 Ind. 486, this court said:—"The assessing officer is not required to go outside of his own county to give notice to any one of his intention to assess omitted property."

It is provided that all personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant on the first day of March of the year for which the assessment is made. Section 16160 Burns' Statutes 1908.

Shares of stock in a corporation are regarded as personal property for the purposes of taxation. *Seward v. City of Rising Sun* 79 Ind. 351.

And such shares of stock are deemed situate at the domicile of the owner for the purposes of taxation. *City of Evansville v. all*, 14 Ind. 27; *Conwell v. President, etc.* 15 Ind. 150. *City of Madison v. Whitney* 21 Ind. 261.

These propositions and citations of law have been made to show that the complaint *prima facie* states a cause of action, and its sufficiency is not assailed upon the ground of any formal defect but appellants' chief insistence is that the tax laws of this state involved are discriminatory against shares of stock in foreign corporations, and for that reason unconstitutional and invalid. "All property within the jurisdiction of this state, not expressly exempted shall be subject to taxation." Section 10142 Burns' Statutes 1908.

No property is exempt except that which is devoted to municipal, educational, literary, scientific, religious and charitable purposes, which the constitution authorizes to be exempted. Section 193 Burns' Statutes 1908.

"All corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this state is situated shall be deemed its residence, but if there be no principal office in the state, then such property shall be listed and taxed at any place in the state where the corporation transacts business." Section 10161 Burns' Statutes 1908.

In addition to listing and causing all tangible property to be assessed, a domestic corporation by its president or other proper accounting officer is required to furnish a sworn statement showing its name and location, the amount and number of shares of capital stock authorized and paid up, the market value, if any, and if none then the actual value of such stock, and the name and value of franchises owned or enjoyed by the corporation. Section 10233 Burns' Statutes 1908. It is provided by the next succeeding section that this statement shall be placed before the County Board of Review, and in all cases where the value of the capital stock exceeds that of the tangible property listed for taxation, such capital stock shall be

subject to taxation upon such excess of value. Section 10199 Burns' Statutes 1908 requires every person to make out and deliver to the proper assessor a definite statement or schedule of the property held or owned by him including among other chattels specified, "All shares in foreign corporations, other than banks (which are covered elsewhere) and their value" and "all shares in other corporations organized under the laws of this state, when the property of such corporation is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares."

87 A blank form of the schedule for assessing individuals is prescribed by section 10202 Burns' Statutes 1908, and 8th item under the head of chattels is:—"All shares of stock in any corporation formed outside of this state; and also all shares of stock in any corporation formed in this state and conducting its business outside of this state."

Appellants' learned counsel concede that under the decisions of this court shares of stock in a corporation are property separate and distinct from the property of the corporation itself, and that they are the property of the owner and holder of them, and subject to taxation under section 10142 supra, unless exempted by some other provision. They contend however that our tax laws wrongfully discriminate in favor of domestic stocks as against shares in a foreign corporation, and that a resident owning stock in a domestic corporation escapes taxation thereon, while his next-door neighbor owning shares of stock in a foreign corporation is required to pay taxes on his holdings. It is argued that such legislative discrimination is an invalid burden on interstate commerce and in violation of the commerce clause of the Constitution of the United States.

We can scarcely conceive that the framers of the Constitution, in conferring upon Congress the power to regulate commerce among the several States, had in contemplation such subject as shares of stock in a private corporation, which are not sold upon the markets in competition with shares of stock in domestic corporations, but whose values must in any given case depend upon the personal management, and the financial and other conditions, of the particular corporation. We may leave it to the Federal courts to decide whether in the evolution of commercial affairs such shares of stock may now be regarded as proper articles of interstate commerce, since upon the facts of this case we are not required to determine that question. No facts appear to show that the stock involved here had ever been the subject of barter and sale or of commerce, or in any way connected with any interstate transaction. It is alleged that appellant Isaac M. Darnell had resided and owned and held such stock in this state for seven years, and it had thus acquired a permanent situs and become a part of the property of the state.

88 Our tax law does not purport to deal with holdings of corporate stocks as articles of commerce and imposes no tax or burden thereon as a condition or incident of importing such property into the state. The tax is authorized only against residents of the state subject to taxation, upon holdings of foreign stocks which have become a constituent part of the property and wealth of the state. It is well settled by the decisions of the Supreme Court of the

United States, that after property has left the channels of commerce and attained a situs in a state, it is subject to the taxing power of the state as other property, and the commerce clause of the Constitution can be invoked only to protect such property against unjust discrimination. *Wilton v. Missouri*, 91 U. S. 275; *Sturgis v. Carter*, 114 U. S. 511; *Brown v. Houston*, 114 U. S. 622; *Pittsburgh etc. Coal Co. v. Bates*, 156 U. S. 577. *Kidd v. Alabama*, 188 U. S. 730; *American etc. Co. v. Speed*, 192 U. S. 538. *Wright v. Louisville etc. R. Co.*, 195 U. S. 219.

Appellants cite in support of their contention the case of *Darnell & Son v. Memphis* 208 U. S. 113. The court in that decision again declared that property which has moved in the channels of interstate commerce after it is at rest in a state and has become commingled with the mass of property therein, may be taxed by such state without thereby imposing a direct burden upon interstate commerce, provided there is no discrimination against such property whereby a burden of taxation is imposed on it greater than that levied upon domestic property of like nature. The conclusion was that the disputed tax involved in that case was a direct burden upon interstate commerce for the reason that the law of Tennessee was discriminatory and imposed a tax upon logs and lumber which were the products of the soil of other states when brought into that state, and in express terms exempted like property produced from the soil of Tennessee.

It is further argued that the tax law of Indiana in question violates section one of the Fourteenth amendment to the Constitution of the United States, for the reason that it denies appellant Isaac M. Darnell equal privileges and immunities with other citizens, and denies him the equal protection of the laws. It is conceded that property cannot be singled out and subjected to discriminative burdens, at any time, because of its foreign origin, but the owner of such property, in its use and enjoyment, is entitled to the equal protection of the laws.

The fallacy in appellants' contention throughout is in the erroneous assumption that the tax law of this state either makes 89 or permits any discrimination against the holder in this state of shares of stock in a foreign corporation. All property, both real and personal, within this state is subject to taxation, except only such as the constitution authorizes to be exempt, because it is devoted to municipal, educational, literary, scientific, religious or charitable purposes. The intent manifest in our tax law is to require all property to contribute pro rata its share of taxes, and so far as practicable to avoid double taxation. Domestic corporations are taxed upon all their property; their tangible property is first listed and assessed in the same manner as like property owned by natural persons, and in addition the corporation is required to furnish a statement showing the value of any franchise or other right owned or enjoyed by it, and the market value of its capital stock, and if in any case the value of the capital stock exceeds that of the tangible property, such excess is also assessed to the corporation. The state, in its discretion, might tax the shares of stock in such

corporation to the individual owners thereof residing in this state but it would in a sense be double taxation and it has not been the policy of this state to do so. Shares of stock in a foreign corporation doing business in another state owned and held by a resident of this state are taxed because they have not been and cannot be otherwise taxed by this state. If a corporation organized in this state is engaged in business in another state, and all its tangible property is outside this state, then its shares of stock owned by residents within this state are taxable in the same manner as stock in a foreign corporation. The fact that the state in which the corporate property may be situated taxes such tangible property in no wise affects the right of this state to tax its own inhabitants upon all their personal property including shares of stock in such foreign corporation. The man who resides in one state and enjoys the benefit of its schools, churches, society, highways and other public accommodations, as well as its governmental protection over his person and property, is in no position to complain when required to contribute by taxation ratably upon his property for the maintenance of these institutions and the local government. It is clear to our minds that the tax law of Indiana is not open to the charge of discrimination against stock in foreign corporations, but imposes only just and equal burdens upon all corporate stocks without regard to the place of incorporating or of

conducting the corporate business, and does not violate either 90 the third clause of section 8, Art. 1, or the Fourteenth Amendment to the Constitution of the United States, and is accordingly valid. *Wright v. Louisville, etc. R. Co.* 195 U. S. 219; *Kidd v. Alabama* 168 U. S. 730; *Georgia Railroad v. Wright*, 124 Ga. 596; *Georgia Railroad v. Wright*, 125 Ga. 589; *Greene County v. Wright*, 126 Ga. 508; *Ogden v. City of St. Joseph* 90 Mo. 522; *Bacon v. Board* 122 Mich. 22, 86 Am. St. 524, 60 L. R. A. 321. *Whitaker v. Brooks* 90 Ky. 681; *San Francisco v. Fry*, 63 Cal. 470; *Greenleaf v. Board*, 184 Ill. 226, 75 Am. St. 168; *Dyer v. Osborne* 11 R. I. 321. Am. Dec. 460.

Appellant Isaac M. Darnell moved the court to strike out the personal judgment rendered against him for the recovery of the amount of taxes found to be due, on the ground that having been served with process by publication only, such judgment was rendered without due process of law. Appellant having unsuccessfully sought to have the action abated, appeared and filed a demurrer to the complaint. This action on his part constituted a full appearance and gave the court jurisdiction to render a personal judgment, without reference to the character of the original process. *Kegg v. Weldon*, 10 Ind. 550; *Hust v. Conn.* 12 Ind. 257; *Knight v. Lowe*, 15 Ind. 374; *City of Crawfordville v. Hays*, 42 Ind. 200; *Slauter v. Hallowell*, 90 Ind. 286; *Gilbert v. Hall*, 115 Ind. 549; *Singleton v. O'Brien* et al., 125 Ind. 151; *Hallinger v. Reeme* et al., 138 Ind. 363; *McCoy, et al. v. Stockman, et al.* 146 Ind. 668; *Chicago, etc. R. Co. v. Kenney*, 159 Ind. 72. 2 Encyc. Pl. & Pr. 635, and authorities there cited.

No error was committed in overruling the motion to modify the judgment. No error in the proceedings and record appearing, the

Judgment is Affirmed. The death of appellant Isaac M. Darnell having been brought to our notice, the affirmance will be entered as of the date of submission.

91 It is therefore considered by the Court that the judgment of the Court below in the above entitled cause, be in all things affirmed at the cost of the appellants all of which is ordered to be certified to said Court.

And it is further considered by the Court, that the appellee recover of the appellants the sum of — for its costs and charge in this behalf expended.

92 And afterwards to-wit, on the 23rd day of May, 1910, being the 1st day of the May Term, 1910, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant by counsel and files in the office of the Clerk of said Court his petition for the allowance of a Writ of Error, said petition and the allowance thereof being hereto and next below attached and being as follows:

93 STATE OF INDIANA:

In the Supreme Court of the State of Indiana,

#21379.

HENRY Y. DARNELL, Executor of the Estate of Isaac M. Darnell,
Deceased, and WALTER S. DARNELL, Appellants,

vs.

THE STATE OF INDIANA, Appellee.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Indiana.

To the Honorable John V. Hadley, Chief Justice of the Supreme Court of the State of Indiana:

Your petitioners, Henry Y. Darnell, executor of the estate of Isaac M. Darnell, deceased, and Walter S. Darnell respectfully show:

1. That since the submission of the above entitled cause, the appellant, Isaac M. Darnell died on or about the 24th day of January, 1910, while a resident of the State of Tennessee; that Henry Y. Darnell, petitioner herein, was duly appointed executor of the last will and testament of the said Isaac M. Darnell and was duly qualified, and as such executor now has the possession of the property of the said Isaac M. Darnell and is responsible and answerable for his debts including the judgment rendered in this cause; that

94 he has heretofore filed in this court a duly certified copy of his appointment as such executor.

2. Your petitioners further complain and show that they are citizens of the United States of America; that in the above entitled matter on the 4th day of February, 1910, final judgment was rendered

against your petitioners by the Supreme Court of the State of Indiana, that being the highest court of law or equity in the said State of Indiana (a petition for a rehearing of which was overruled on the 21st day of April, 1910) wherein it was adjudged that the provisions of chapter 128 of Burns' Revised Statutes, 1908, of the State of Indiana, being Sections 10140-10434, and particularly Sections 10143, 10199 and 10202, as applied and enforced in the levying, collecting and assessing of taxes on the shares of stock in foreign corporations owned by citizens of said State, the same being the taxing statutes of said State, did not discriminate against shares of stock in foreign corporations, nor the owner and holder of stock in foreign corporations in favor of shares of stock in domestic corporations and the owner and holder of stock in domestic corporations, so as in any way to become a burden on inter-state commerce, and that said statutes were not in conflict with the provisions of Section 8, Article I of the Constitution of the United States which provides, "the Congress shall have power * * * to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

3. It was also adjudged by said Supreme Court by its said final judgment in the above entitled matter, that the provisions of said taxing statutes and particularly of Sections 10143, 10199 and 95 10202 thereof, as applied and enforced in the levying, assessing and collecting of taxes in said State, on shares of stock in foreign corporations are not in violation of Section I of the fourteenth amendment of the Constitution of the United States, which provides as follows:

"Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

4. That said judgment and decision of said Supreme Court of the State of Indiana denies and deprives your petitioners of rights and privileges guaranteed to them by the Constitution of the United States, all of which appears in the record, opinion and final judgment of said Supreme Court of the State of Indiana, whereby manifest error has happened to the great damage of your petitioners.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Indiana and the judges thereof to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioners may be examined and corrected and said judgment reversed and your petitioners discharged, and your petitioners will ever pray.

HENRY Y. DARNELL,

Executor,

WALTER S. DARNELL,

Petitioners,

By MERRILL MOORES,
COCKROFT & ODLE,
JOS. F. COWERN,

Their Attorneys,

96 The writ of error as prayed for in the foregoing petition is hereby allowed this 21st day of May, A. D. 1910, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Twenty Thousand (\$20,000.00) Dollars with the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety.

Dated at Indianapolis this 21 day of May, A. D. 1910.

JOHN V. HADLEY,

*Chief Justice of the Supreme Court of
the State of Indiana.*

Filed in my office this 23rd day of May, A. D. 1910.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

EDWARD V. FITZPATRICK,

Clerk of the Supreme Court of the State of Indiana.

97 [Endorsed:] #21379. Henry Y. Darnell, Executor of the Estate of Isaac M. Darnell, Deceased, & Walter S. Darnell, Appellants, vs. State of Indiana, Appellee. Petition for Writ of Error. Filed May 23, 1910. Edward V. Fitzpatrick, Clerk. 1st day. Merrill Moores, Cockroft & Odle, Jos. F. Cower, Att'ys for Petitioners.

98 And on the same day the following further pleas and proceedings were had herein:

Come now the appellants by counsel and file a Writ of Error from the Supreme Court of the United States to the said Supreme Court of Indiana, in said cause, said Writ of Error being hereto next below attached and being as follows:

99 UNITED STATES OF AMERICA:

The President of the United States of America to the Judges of the Supreme Court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Supreme Court, before you, between Henry Y. Darnell, Executor of the Estate of Isaac M. Darnell, deceased, and Walter S. Darnell, appellants and Plaintiffs in Error and The State of Indiana, Appellee and Defendant in Error a manifest error hath happened to the great damage of the said appellants and plaintiffs in errors, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., thirty days after the date hereof in the said Supreme Court of the United States, to be then and there held, that the

record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 23d day of May A. D. 1910.

[Seal Circuit Court of the United States, District
of Indiana.]

NOBLE C. BUTLER, *Clerk*.

[Endorsed:] Filed May 23, 1910. Edward V. Fitzpatrick, Clerk.

100 And on the same day the following further pleas and proceedings were had herein:

Come now the appellants by counsel and file their bond on appeal to the Supreme Court of the United States in the penal sum of Twenty Thousand Dollars, which bond was approved by the Chief Justice of said Supreme Court for said May Term, a copy of which bond is hereto next below attached and being as follows:

101 STATE OF INDIANA:

In the Supreme Court of the State of Indiana.

No. 21379.

HENRY Y. DARNELL, Executor of the Estate of Isaac M. Darnell, Deceased, and Walter S. Darnell, Appellants and Plaintiffs in Error,

vs.

THE STATE OF INDIANA, Appellee and Defendant in Error.

Supersedeas Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Indiana.

Know all men by these presents that we, Henry Y. Darnell, Executor of the Estate of Isaac M. Darnell, Deceased, and Walter S. Darnell as principals, and the United States Fidelity & Guaranty Company as surety, are held and firmly bound unto the above named State of Indiana in the sum of Twenty Thousand (\$20,000.00) Dollars to be paid to the said State of Indiana for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, successors, assigns and administrators, jointly and severally, firmly by these presents.

Scaled with our seals and dated this 21st day of May, in the year of our Lord, one thousand nine hundred ten.

Whereas the above named appellants and plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States

to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Indiana.

102 Now, therefore, the condition of this obligation is such that if the above mentioned appellants and plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

HENRY Y. DARNELL,

Executor of the Estate of Isaac M. Darnell, Deceased.

WALTER S. DARNELL.

UNITED STATES FIDELITY & GUARANTY
COMPANY.

By JOHN E. MESSICK, *Attorney in Fact.*

[SEAL.]

Attest:

I hereby approve the foregoing bond and surety this 23rd day of May, 1910.

LEANDER J. MONKS,

*Chief Justice of the Supreme Court of the
State of Indiana.*

May 23, 1910.

The United States Fidelity & Guaranty Company of Baltimore, Md., has fully complied with the Laws of Indiana.

J. C. BILLHEIMER,

Auditor of State.

103 And on the same day the following further pleas and proceedings were had herein:

Come now the appellants by counsel and file their citation on said Writ of Error, said citation and proof of service thereon being hereto next below attached and being as follows:

104 STATE OF INDIANA:

In the Supreme Court of the State of Indiana.

HENRY Y. DARNELL, Executor of the Estate of Isaac M. Darnell, Deceased, and Walter S. Darnell, Appellants and Plaintiffs in Error,

vs.

THE STATE OF INDIANA, Appellee and Defendant in Error.

Citation to Defendant in Error.

To the State of Indiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30)

days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein Henry Y. Darnell, Executor of the Estate of Isaac M. Darnell, Deceased, and Walter S. Darnell are appellants and plaintiffs in error, and you are appellee and defendant in error to show cause, of any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John V. Hadley, Chief Justice of
 105 the Supreme Court of the State of Indiana this 23rd day of
 May in the year of our Lord one thousand nine hundred
 and ten.

LEANDER J. MONKS,
*Chief Justice of the Supreme Court of the
 State of Indiana.*

Service of above notice, and citation is hereby acknowledged this
 23rd day of May, 1910, and the State of Indiana hereby enters its
 appearance.

JAMES BINGHAM,
Attorney General,
 MORTON S. HAWKINS
Attorneys for State of Indiana.

106 [Endorsed:] #21379. Henry Y. Darnell, Executor of the
 Estate of Isaac M. Darnell, Deceased, & Walter S. Darnell,
 Appellants & Plaintiffs in Error, vs. State of Indiana, Appellee &
 Def. in Error. Citation. Filed May 23, 1910. Edward V. Fitz-
 patrick, Clerk.

107 And on the same day the following further pleas and pro-
 ceedings were had herein:

Come now the appellants by counsel and file their Assignment
 of Errors in the Supreme Court of the United States on the Writ
 of Error herein, said Assignment of Errors being hereto next below
 attached, and being as follows:

108 STATE OF INDIANA:

In the Supreme Court of the *State of the United States*.

(#21379.)

HENRY Y. DARNELL, Executor of the Estate of Isaac M. Darnell, Deceased, and WALTER S. DARNELL, Plaintiff in Error,

vs.

THE STATE OF INDIANA, Defendant in Error.

Assignment of Errors Filed with Application for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Indiana.

Comes now Henry Y. Darnell, executor of the estate of Isaac M. Darnell, deceased, and Walter S. Darnell, appellants and plaintiffs in error, and separately and severally respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Indiana in the above entitled matter, a copy of the opinion in which is filed herewith made a part hereof and for certainty marked "Exhibit A," there is manifest error in this, to wit:

1. The Court erred in holding that the provisions of chapter 128 of Burns' Revised Statutes, 1908, of the State of Indiana, being Sections 10140 to 10434, and particularly Sections 10143, 10199 and 10202, as construed by the Appellate and Supreme Courts of said State, the same being the taxing statutes of said State, did not discriminate against the owner and holder of stock (and shares of stock) in foreign corporations in favor of the owner and holder of stock (and shares of stock) in domestic corporations, so as to be a burden on inter-state commerce and that said tax statutes were not in conflict with the provisions of Section 8 of Article I, of the Constitution of the United States which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations among the several states, and with the Indian tribes,"

for, that the State of Indiana by and through the provisions of said taxing statutes as applied, enforced and construed, seeks to and does unlawfully burden and discriminates against shares of stock in foreign corporations and also the ownership, sale and transfer of said shares of stock in foreign corporations in favor of shares of stock and the ownership, sale and transfer of said shares of stock in domestic corporations,—all in violation of said Section 8 of Article I of the Constitution of the United States above set forth.

2. The Court erred in holding that the provisions of the said taxing statutes of the State of Indiana, and particularly of Sections 10143, 10199 and 10202 thereof, as construed by the Supreme Court of said State, are not in violation of Section 1 of the fourteenth

amendment to the Constitution of the United States which provides as follows:

“Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws.”

for, that the State of Indiana, by and through the provisions of said taxing statutes in operation and as carried out by the taxing officers and as construed, seeks to and does unlawfully burden and discriminates against shares of stock in foreign corporations and the ownership, sale and transfer of shares of stock in foreign corporations in favor of shares of stock and the ownership, sale and transfer
 110 of shares of stock in domestic corporations, in violation of said Section 1 of the fourteenth amendment to the Constitution of the United States above set forth.

3. The Court erred in giving judgment for State of Indiana and against the appellants and plaintiffs in error, when, by the law of the land the said judgment ought to have been given for the appellants and plaintiffs in error and against the said State of Indiana.

Wherefore, Henry Y. Darnell, executor of the estate of Isaac M. Darnell, deceased, and Walter S. Darnell, appellants and plaintiffs in error, severally pray that the Supreme Court of the United States reverse the said final order and judgment of the Supreme Court of the State of Indiana, and that they may be restored to all things which they have lost by occasion of the said final order and judgment, and that they may have such other and further relief as may be proper and just.

MERRILL MOORES,
 COCKROFT & ODLE,
 JOS. F. COWERN.

*Attorneys for Henry Y. Darnell, Executor of the Estate of
 Isaac M. Darnell, Deceased, and Walter S. Darnell.*

111

“EXHIBIT A.”

STATE OF INDIANA:

In the Supreme Court of the State of Indiana.

ISAAC M. DARNELL and WALTER S. DARNELL, Appellants,
 vs.

STATE OF INDIANA, Appellee.

Opinion by Montgomery, J.

This is a suit in equity brought by the State in its capacity as a sovereign and as *parens patriæ* and trustee for all the people and the political subdivisions of the state, to recover of Isaac M. Darnell \$12,000 for taxes on property omitted from taxation, to set aside a fraudulent conveyance of real estate, and to foreclose the state's lien for taxes against such real estate, and for the appointment of

a receiver. Emma Darnell voluntarily appeared and on application was made a party defendant, and thereupon made claim of ownership to certain personal property mentioned in the complaint. This claim, together with the application for a receiver, was submitted to the court upon affidavits. The personal property was awarded to Mrs. Darnell, and a receiver was appointed to take and hold possession of the real estate in controversy during the litigation.

Appellee caused an affidavit to be filed with its complaint, alleging that appellants Isaac M. Darnell and Walter S. Darnell were not residents of this state, and that the action was to enforce a lien upon real estate in Marion county and for possession of real estate within the state of Indiana, in the language of the provisions of the third subdivision of section 322 Burns' Ann. St. 1908. The court upon this affidavit ordered the publication of nonresident notice as provided in said section requiring appellants to appear and answer to the complaint on January 22, 1908. In response to this notice, which was duly given and proof thereof made and filed in the cause, appellants appeared specially and filed what it termed a "plea in abatement" to which appellee's demurrer for insufficient facts was sustained. A petition to remove the cause to the federal court was filed by appellants, which petition was rejected, and thereupon appellants jointly and severally demurred to the complaint, on the grounds that the facts therein alleged were insufficient to constitute a cause of action, and that the court had no jurisdiction over the persons of the defendants or the subject-matter of the action. This demurrer was overruled, and appellants declining to plead further, judgment was rendered in favor of the state in accordance with the prayer of the complaint. Motions to modify and to vacate the judgment were subsequently made and severally overruled.

112 It is averred upon appeal that the court erred in (1) sustaining appellee's demurrer to the plea in abatement, (2) denying the application for removal to the federal court, (3) overruling appellants' demurrer to the complaint, overruling the motions, (4) to vacate, and (5) to modify, the judgment.

The complaint, in brief, charged: That Isaac M. Darnell was a resident of, and maintained his domicile in, the city of Indianapolis, Marion County, Ind., for each of the years from 1900 to 1907, inclusive, and that during each of said years he was the owner of shares of capital stock in a corporation called "I. M. Darnell & Son Company," which was incorporated under the laws of the state of Tennessee, and which had exercised no corporate functions, owned no property, and paid no taxes, in this state, during any of said years, and that the value of the stock owned by said Isaac M. Darnell as aforesaid, for each of said years, was as follows: 1900, \$89,300; 1901, \$98,300; 1902, \$89,300; 1903, \$49,300; 1904, \$49,300; 1905, \$49,300; 1906, \$49,300; 1907, \$49,300. That said Isaac M. Darnell unlawfully omitted and failed to list and return said property for taxation for each of said years, and that on May 10, 1907, the auditor of Marion County duly placed said property on the tax duplicate of said county, and computed and extended taxes thereon for each of said years, on May 10, 1907, and charged the same to

said Darnell as taxes on omitted property to the aggregate amount of \$10,568.59, which amount, with delinquent penalties of 16 per cent. thereon, remains upon said duplicate and is owing by said Darnell due and unpaid. That appellant Walter S. Darnell is the son of said Isaac M. Darnell, and for a number of years has managed the business of his father, who is 84 years of age, and on March 28, 1907, the taxing officers of Marion county gave notice by registered letter to said Isaac M. Darnell that they intended to and would assert a claim against him for said omitted taxes, which letter and notice were receipted for by said Walter S. Darnell, who then and there had full notice of the contents thereof. That at the time of receiving said notice said Isaac M. Darnell was the owner in fee simple of certain real estate described in the city of Indianapolis, of the value of \$8,500 and thereafter said Isaac M. Darnell, with intent to cheat, hinder, and delay appellee, said county, city, board of school commissioners, and others, and for the fraudulent purpose of preventing the collection of said indebtedness and taxes due from him, did on April 25, 1907, by warranty deed convey said real estate to said Walter S. Darnell for a stated consideration of \$8,500, but in fact no consideration was paid, promised, or agreed to be paid for such conveyance. That for the purpose of defeating the collection of said taxes said Isaac M. Darnell fraudulently divided and distributed all his property among his children, and since the conveyance of said real estate has had no property subject to execution in this state. That said property is held by Walter S. Darnell in trust for Isaac M. Darnell and is subject to the lien of the state for the payment of said taxes in full.

The plea in abatement, in substance, alleged: That — the commencement of this action Isaac M. Darnell was not a resident of this state, and owned no property therein; that prior to March 1, 1907, he removed from Indiana, and at the time the alleged assessment was made he was a nonresident of this state, and none of the property assessed was within the state or owned by him; that Walter S. Darnell had no real or personal property in Marion county subject to taxation for the year 1907; that the purchase and conveyance of said real estate were made for the consideration stated in the deed; and that at the time the affidavit was made upon which the publication of notice was ordered, neither Isaac M. Darnell nor Walter S. Darnell was a resident or within the jurisdiction, of this state. This plea is clearly insufficient to abate the action. It is, in effect, a categorical denial of the jurisdiction of the court, and of the truth of material averments of the complaint. The allegation that

113 appellants are nonresidents is of no consequence, since that fact appears from the complaint, and jurisdiction over the cause was acquired in the way provided by statute in such cases. The regularity and sufficiency of the procedure to acquire jurisdiction are not challenged. The denial that the property assessed against Isaac M. Darnell was subject to taxation for the year 1907 goes to the merits, and if true would constitute a partial answer in bar rather than in abatement. The court did not err in sustaining appellee's

demurrer in this plea. *Sloan v. Lowder*, 23 Ind. App. 118, 321, 54 N. E. 135.

It is further contended that the demurrer to the answer in abatement searched the record, and should have been carried back and sustained to the complaint. This view of the law is erroneous, and such a demurrer does not search the record. *State v. Roberts*, 166 Ind. 585, 589, 77 N. E. 1093; *Goldsmith v. Chipps* 154 Ind. 28, 55 N. E. 855; *Indiana, etc. R. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264; *Price v. Grand Rapids, etc. R. Co.*, 18 Ind. 137; *Rush v. Foos Mfg. Co.* 20 Ind. App. 515, 51 N. E. 143; 6 Ency. Pl. & Pr. 332.

The petition for removal of the cause to the federal court was rightly denied, for the reasons that there was no diversity of citizenship, or showing that a federal question, or question arising under the Constitution, laws, or treaties of the United States, was involved. A state is not a citizen and the cause was not removable on the ground of diversity of citizenship. 4 Fed. Stat. Ann. p. 290 (U. S. Comp. St. 1901, p. 509); *Postal Tel. etc., Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Indiana v. Tolleston Club*, 53 Fed. 18; *Indiana v. Allegheny Oil Co. (C. C.)* 85 Fed. 870. The complaint did not raise any question arising under the Constitution, laws, or treaties of the United States, and the cause was not transferable on such grounds. 4 Fed. Stat. Ann. p. 314; *Arkansas v. Kansas, etc., Coal Co.*, 183 U. S. 188, 22 Sup. Ct. 37; 46 L. Ed.; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482.

The capacity of the state to maintain this suit is not challenged by the demurrer, and it is well settled that the courts are open to the state as a litigant, both by virtue of its corporate rights and in its sovereign capacity. *State v. Ohio Oil Company*, 150 Ind. 21, 27, 49 N. E. 809, 47 L. R. A. 627.

The owner of property on the 1st day of March is personally liable for the taxes on such property for that year. *Mullikin v. Reeves*, 71 Ind. 281; *Funk v. State ex rel.*, 166 Ind. 455, 77 N. E. 854.

A tax is a debt for the collection of which a creditor's bill may be brought. *State v. Georgia Company*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485; *Albany County v. Durant*, 9 Paige (N. Y.) 182; *People v. Weber*, 174 Ill. 412, 45 N. E. 723; *McInerney v. Reed*, 23 Iowa, 410; *United States v. Pacific R. R. Co.*, 4 Dillon, 66 Fed. Cas. No. 15,983; *State v. Duncan*, 3 Lea (Tenn.) 679.

"The lien of the State for all taxes for state, county, school, road, or township purposes, shall attach on all real estate, on the first day of March annually, and such lien shall be perpetual for all taxes due from the owner thereof, which have heretofore accrued or shall hereafter accrue, with interest and penalties in each case until payment; which lien shall in no wise be affected by any sale or transfer of any such real estate." Section 10,343, Burns' Ann. St. 1908. It is further provided that "all the property both real and personal, situated in any county, shall be liable for the payment of all taxes,

penalties, interest and costs charged to the owner thereof in such county," etc. Section 10.344, Burns' Ann. St. 1908. The
 114 assessment of omitted property as shown in the complaint was made in pursuance of express statutory authority, and the pertinent part of the statute reads as follows: "Whenever the county auditor shall discover or receive credible information * * * that any personal property has from any cause been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto with the proper valuation, and charge such property and the owner thereof, with the proper amount of taxes thereon; to enable him to do which he is invested with all the powers of assessors under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office at a specified time, within five days after giving such notice and show cause, if any why such property should not be added to the tax duplicate," etc. Section 10.310, Burns' Ann. St. 1908. In construing this statute in the case of *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 37 L. R. A. 384, 62 Am. St. Rep. 436, this court said: "The assessing officer is not required to go outside of his own county to give notice to any one of his intention to assess omitted property." It is provided that all personal property shall be assessed to the owner in the township, town, or city of which he is an inhabitant on the 1st day of March of the year for which the assessment is made. Section 10.160 Burns' Ann. St. 1908.

Shares of stock in a corporation are regarded as personal property for the purposes of taxation. *Seward v. City of Rising Sun* 79 Ind. 351. And such shares of stock are deemed situate at the domicile of the owner for the purposes of taxation. *City of Evansville v. Hall* 14 Ind. 27; *Conwell v. President, etc.*, 15 Ind. 150. *City of Madison v. Whitney*, 21 Ind. 261.

These propositions and citations of law have been made to show that the complaint *prima facie* states a cause of action, and its sufficiency is not assailed upon the ground of any formal defect; but appellants' chief insistence is that the tax laws of this state involved are discriminatory against shares of stock in foreign corporations, and for that reason unconstitutional and invalid. "All property within the jurisdiction of this state not expressly exempted, shall be subject to taxation." Section 10.142, Burns' Ann. St. 1908. No property is exempt except that which is devoted to municipal, educational, literary, scientific, religious, and charitable purposes, which the Constitution authorizes to be exempted. Section 193, Burns' Ann. St. 1908. "All corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this state is

situated shall be deemed its residence, but if there be no principal office in the state, then such property shall be listed and taxed at any place in the state where the corporation transacts business." Section 10,161, Burns' Ann. St. 1908.

In addition to listing and causing all tangible property to be assessed, a domestic corporation by its president or other proper accounting officer is required to furnish a sworn statement showing its name and location, the amount and number of shares of capital stock authorized and paid up, the market value, if any, and, if none, then the actual value of such stock, and the name and value of franchises owned or enjoyed by the corporation. Section 10,233, Burns' Ann. St. 1908. It is provided by the next succeeding section that this statement shall be placed before the county board of review, and in all cases where the value of the capital stock exceeds that of the tangible property listed for taxation such capital stock shall be subject to taxation upon such excess of value. Section 10,199

115 Burns' Ann. St. 1908, requires every person to make out and deliver to the proper assessor a definite statement or schedule of the property held or owned by him, including, among other chattels specified, "all shares in foreign corporations, other than banks (which are covered elsewhere) and their value," and "all shares in other corporations organized under the laws of this state, when the property of such corporation is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares." A blank form of the schedule for assessing individuals is prescribed by section 10,202, Burns' Ann. St. 1908, and the eighth item under the head of "Chattels" is: "All shares of stock in any corporation formed outside of this state; and also all shares of stock in any corporation formed in this state and conducting its business outside of this state."

Appellants' learned counsel concede that under the decisions of this court shares of stock in a corporation are property separate and distinct from the property of the corporation itself, and that they are the property of the owner, and holder of them, and subject to taxation under Section 10,142, *supra*, unless exempted by some other provision. They contend, however, that our tax laws wrongfully discriminate in favor of domestic stocks as against shares in a foreign corporation, and that a resident owning stock in a domestic corporation escapes taxation thereon, while his next-door neighbor owning shares of stock in a foreign corporation is required to pay taxes on his holdings. It is argued that such legislative discrimination is an invalid burden on interstate commerce and in violation of the commerce clause of the Constitution of the United States.

We can scarcely conceive that the framers of the Constitution, in conferring upon Congress the power to regulate commerce among the several states, had in contemplation such subject as shares of stock in a private corporation, which are not sold upon the markets in competition with shares of stock in domestic corporations, but whose value must in any given case depend upon the personal management, and the financial and other conditions, of the particular

corporation. We may leave it to the federal courts to decide whether in the evolution of commercial affairs such shares of stock may now be regarded as proper articles of interstate commerce, since upon the facts of this case we are not required to determine that question. No facts appear to show that the stock involved here had ever been the subject of barter and sale or of commerce, or in any way connected with any interstate transaction. It is alleged that appellant Isaac M. Darnell had resided and owned and held such stock in this state for seven years, and it had thus acquired a permanent situs and become a part of the property of the state. Our tax law does not purport to deal with holdings of corporate stocks as articles of commerce and imposes no tax or burden thereon as a condition or incident of importing such property into the state. The tax is authorized only against residents of the state subject to taxation, upon holdings of foreign stocks which have become a constituent part of the property and wealth of the state. It is well settled by the decisions of the Supreme Court of the United States that, after property has left the channels of commerce and attained a situs in a state, it is subject to the taxing power of the state as other property, and the commerce clause of the Constitution can be invoked only to protect such property against unjust discrimination. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Pittsburg, etc., Coal Co. v. Bates* 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538; *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *American, etc., Co. v. Speed*, 192 U. S. 538, 24 Sup. Ct. 365, 48 L. Ed. 538; *Wright v. Louisville, etc. R. Co.*, 195, U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167.

Appellants cite in support of their contention the case of *Darnell & Son v. Memphis*, 208 U. S. 113, 28 Sup. Ct. 247, 52 L. Ed. 413. The court in that decision again declared that property which has moved in the channels of interstate commerce after it is at rest in a state and has become commingled with the mass of property therein may be taxed by such state without thereby imposing a direct burden upon interstate commerce, provided there is no discrimination against such property whereby a burden of taxation is imposed on it greater than that levied upon domestic property of like nature. The conclusion was that the disputed tax involved in that case was a direct burden upon interstate commerce for the reason that the law of Tennessee was discriminatory and imposed a tax upon logs and lumber which were the products of the soil of other states when brought into that state, and in express terms exempted like property produced from the soil of Tennessee.

It is further argued that the tax law of Indiana in question violates section 1 of the fourteenth amendment to the Constitution of the United States, for the reason that it denies appellant Isaac M. Darnell equal privileges and immunities with other citizens, and denies him the equal protection of the laws. It is conceded that property cannot be singled out and subjected to discriminative bur-

dens, at any time, because of its foreign origin; but the owner of such property, in its use and enjoyment, is entitled to the equal protection of the laws.

The fallacy in appellants' contention throughout is in the erroneous assumption that the tax law of this state either makes or permits any discrimination against the holder in this state of shares of stock in a foreign corporation. All property, both real and personal, within this state, is subject to taxation, except only such as the Constitution authorizes to be exempt, because it is devoted to municipal, educational, literary, scientific, religious, or charitable purposes. The intent manifest in our tax law is to require all property to contribute pro rata its share of taxes, and so far as practicable to avoid double taxation. Domestic corporations are taxed upon all their property; their tangible property is first listed and assessed in the same manner as like property owned by natural persons, and in addition the corporation is required to furnish a statement showing the value of any franchise or other right owned or enjoyed by it, and the market value of its capital stock, and, if in any case the value of the capital stock exceeds that of the tangible property, such excess is also assessed to the corporation. The state, in its discretion, might tax the shares of stock in such corporation to the individual owners thereof residing in this state, but it would in a sense be double taxation, and it has not been the policy of this state to do so. Shares of stock in a foreign corporation doing business in another state owned and held by a resident of this state are taxed because they have not been and cannot be otherwise taxed by this state. If a corporation organized in this state is engaged in business in another state, and all its tangible property is outside this state, then its shares of stock owned by residents within this state are taxable in the same manner as stock in a foreign corporation. The fact that the state in which the corporate property may be situated taxes such tangible property in no wise affects the right of this state to tax its own inhabitants upon all their personal property including shares of stock in such foreign corporation. The man who resides in one state and enjoys the benefit of its schools, churches, society, highways, and other public accommodations, as well as its governmental protection over his person and property, is in no position to complain when required to contribute by taxation ratably upon his property for the maintenance of these institutions and the local government. It is clear to our minds that the tax law of Indiana is not open to the charge of discrimination against stock in foreign corporations, but imposes only just and equal burdens upon all corporate stocks without regard to the place of incorporating or of conducting the corporate business, and does not violate either the third clause of section 8, art. 1, or the fourteenth amendment to the Constitution of the United States, and is accordingly valid. *Wright v. Louisville, etc., R. Co.*, 195, U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167; *Kidd v. Alabama*, 188 U. S. 720, 23 Sup. Ct. 401, 47 L. Ed. 639; *Georgia Railroad v. Wright*, 124 Ga. 596, 53 S. E. 251; *Georgia Railroad v. Wright*, 125 Ga. 589, 54 S. E. 52; *Green County v. Wright*, 126

Ga. 508, 54 S. E. 951; Ogden v. City of St. Joseph, 90 Mo. 522, 3 S. W. 25; Bacon v. Board, 127 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524; Whitaker v. Brooks, 90 Ky. 68 Cal. 470; Greenleaf v. Board 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168; Dyer v. Osborn, 11 R. I. 321, 23 Am. Rep. 460.

Appellant Isaac M. Darnell moved the court to strike out the personal judgment rendered against him for the recovery of the amount of taxes found to be due, on the ground that, having
117 been served with process by publication only, such judgment was rendered without due process of law. Appellant, having unsuccessfully sought to have the action abated, appeared and filed a demurrer to the complaint. This action on his part constituted a full appearance and gave the court jurisdiction to render a personal judgment, without reference to the character of the original process. Kegg v. Welden, 10 Ind. 550; Hust v. Conn, 12 Ind. 257; Knight v. Lowe, 15 Ind. 374; City of Crawfordsville v. Hays, 42 Ind. 200; Slaughter v. Hollowell 90 Ind. 286; Gilbert v. Hall, 115 Ind. 549, 18 N. E. 28; Singleton v. O'Brien et al., 125 Ind. 151, 25 N. E. 154; Hollinger v. Reeme et al., 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402; McCoy et al. v. Stockman et al., 146 Ind. 658, 46 N. E. 21; Chicago, etc. R. Co. v. Kenney, 159 Ind. 72, 62 N. E. 26; 2 Encyc. Pl. & Pr. 635 and authorities there cited. No error was committed in overruling to modify the judgment.

No error in the proceedings and record appearing, the judgment is affirmed. The death of appellant Isaac M. Darnell having been brought to our notice, the affirmance will be entered as of the date of submission.

118 [Endorsed:] Henry Y. Darnell, Executor of the Estate of Isaac M. Darnell, Deceased, and Walter S. Darnell, Appellants & Plaintiffs in Error, vs. State of Indiana, Appellee and Defendant in Error. Assignment of Errors. Filed May 23, 1910. Edward V. Fitzpatrick, Clerk. Merrill Morris, Cockcroft & Odle, Jos. F. Cowern, Att'ys for P'fs in Error.

119 STATE OF INDIANA:

In the Supreme Court.

I, Edward V. Fitzpatrick, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered and all decrees and orders entered in the Supreme Court of Indiana, in the above entitled cause: No. 21379, Isaac N. Darnell et al. v. State of Indiana, appealed from the Marion Circuit Court; also the original petition for the allowance of a Writ of Error, the original Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Indiana with the allowance thereof; the original citation to the defendant in error and acknowl-

edgment of service thereof, a copy of the original bond and of its approval by the Chief Justice of said Supreme Court and the Assignment of Errors in the Supreme Court of the United States by the plaintiff in error, which said transcript annexed hereto, together with said original petition, original Writ of Error, original citation and copy of the bond, I hereby certify as and for my full return to said Writ of Error.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at the City of Indianapolis, this 28th day of May, 1910.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

EDWARD V. FITZPATRICK,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 22,227. Indiana Supreme Court. Term No. 606. Henry Y. Darnell, executor of the estate of Isaac M. Darnell, deceased, and Walter S. Darnell, plaintiffs in error, vs. The State of Indiana. Filed June 15th, 1910. File No. 22,227.

13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. ~~2002~~ 78

Office Supreme Court, U. S.
FILED.

MAR 4 1911

JAMES H. McKENNA

HENRY Y. DARNELL, Executor of the Estate of ISAAC
M. DARNELL, Deceased, and WALTER S. DARNELL,
Plaintiffs in Error.

vs.

THE STATE OF INDIANA,
Defendant in Error.

In Error to the Supreme Court of the State of Indiana.

Brief for Plaintiffs in Error

MERRILL MOORES,
COCKROFT & ODLE,
JOS. F. COWERN,
Attorneys for Plaintiffs in Error.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1910.

No. 606.

HENRY Y. DARNELL, EXECUTOR OF THE
ESTATE OF ISAAC M. DARNELL, DE-
CEASED, AND WALTER S. DARNELL,
Plaintiffs in Error,
vs.

THE STATE OF INDIANA, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF
THE STATE OF INDIANA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This suit is an attempt on the part of the State of Indiana to collect taxes levied upon the stock of a foreign corporation, and involves the constitutionality of so much of the taxing laws of Indiana as requires the owners of stock in foreign corporations to list such stock for taxation, while exempting the owners of stock in domestic corporations from such liability.

On the 23d day of November, 1907, the State of Indiana, as *parens patriae* and trustee for all of the people, filed suit against Isaac M. Darnell and Walter S. Darnell for the purpose of collecting the sum of \$12,000 that had been back assessed against Isaac M. Darnell upon certain shares of stock in a Tennessee corporation owned by him while living in the State of Indiana during the years 1900 to 1907, both inclusive. (Tr. pp. 1 to 8.) The complaint sets out in detail the various steps that were taken by the taxing authorities in back assessing these shares of stock, but as a statement of the allegations of the complaint as to such matters would only burden this brief without throwing any light upon the questions presented to the Court, we shall omit any further reference thereto.

It was alleged that a certain deed from Isaac M. Darnell to Walter S. Darnell, conveying certain property in Marion county, Indiana, was made without consideration and for the purpose of avoiding the payment of these taxes, and the State prayed that said deed be set aside and that the property sought to be conveyed be sold to satisfy its claim for taxes. (Tr. p. 7.)

The suit was based upon the taxing statutes of Indiana, and we set out below the particular sections thereof that have a bearing on the questions presented here.

Section 4 of an act of 1895 (Acts of 1895, p. 21), being Section 10143 of Burns' Rev. Stat. 1908, and Section 8411 of Burns' Rev. Stat. 1901, reads as follows:

“For the purpose of taxation real property shall include all lands within the State and all buildings and fixtures thereon and appurtenances thereto excepting in cases otherwise expressly provided by law; personal property shall include all goods and chattels within the State, all ships, boats and vessels belonging to inhabitants of this State, whether at home or abroad, and their appurtenances; all goods, chattels and effects belonging to inhabitants of this State situate without this State, except the property actually and permanently invested in business in another State shall not be included; all indebtedness due to inhabitants of this State above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, and whether such debtors reside within or without the State; *all shares in corporations organized under the laws of this State when the property of such corporations is not exempt or is not taxable to the corporation itself*; all shares in banks organized in this State under any law of the United States, but in estimating the value of such shares deductions shall be made of the value of all real estate taxed to the bank; *all shares in foreign corporations, except national banks*, owned by inhabitants of the State; all moneys, all circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency; all annuities and royalties, all interests owned by individuals in lands, the fee of which is in this State or in the United States, except as hereinafter provided. Property exempted from taxation by the laws of the

United States shall not be included. *Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder.* Lands sold by the State, including lands forfeited to the sinking fund, the university fund and all other trust funds, though not granted or conveyed, shall be assessed in the same manner as if actually conveyed. All lands reserved to or for any individual by any treaty between the United States and any Indian tribe or nation shall be liable to taxation from the time such treaty shall have been confirmed."

Section 50 of an act of 1891 as amended March 6, 1899 (Acts of 1899, p. 491), being Section 10199 of Burns' Rev. Stat. 1908, and Section 8460 of Burns' Rev. Stat. 1901, reads:

"Every person required by this act to make or deliver such statement or schedule shall set forth an account of the property held or owned by him, as follows:

First. All annuities and royalties.

Second. All bonds, notes, mortgages, accounts, demands, claims and other indebtedness owing to such person, whether such indebtedness is owing from individuals or from corporations, public or private, and whether such debtors reside within or without the State.

Third. All *bona fide* indebtedness owing to such person which shall be held to mean notes and accounts only.

Personal Property—Chattels.

First. All shares in banks organized in this State under any law of this State, or of the

United States, and their full market value, after deducting the value of the real estate as taxed to the banks.

Second. *All shares in foreign corporations, other than banks, and their value.*

Third. *All shares in other corporations, organized under the laws of this State, when the property of such corporation is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares.*

Fourth. All moneys, including circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency, and gold, silver and other coin.

Fifth. The value of all gold and silver plate, watches, diamonds and jewelry.

Sixth. The value of all household furniture and musical instruments.

Seventh. All patent rights, describing them and giving the number of each patent and the value of each.

Eighth. The number and kinds of domestic animals and their value.

Ninth. All wagons, carriages and sleighs and their value.

Tenth. All mechanical and agricultural implements and tools and their value.

Eleventh. All machinery not affixed to real property and its value.

Twelfth. All ships, boats and vessels, whether at home or abroad, and their value.

Thirteenth. All merchandise and stock in trade, and its value.

Fourteenth. All logs, timber, lumber, posts, ties, cord wood, staves or other felled or cut timber and their value.

Fifteenth. All other goods, chattels and personal property not heretofore specially mentioned and their value, except property specifically exempt from taxation."

Section 53 of an act of 1891, as amended February 25, 1903 (Acts 1903, p. 49), being Section 10202 of Burns' Rev. Stat 1908, contains a long schedule for use in making returns for taxation. We set out this section below, but omit all that portion of the schedule which has no bearing on the case:

"Before the first day of March of each year the County Auditor shall have in readiness for delivery to the Assessor the proper assessment books and necessary blanks for the assessment of all property, real and personal. The schedule, with affidavits thereto attached, to be signed by the party, shall be in the following form, the names and places being changed to suit each person: The words 'value,' 'cash value,' 'true value,' or 'valuation,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which such term or terms are applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at force or auction sale. The party shall write the word 'none' after each item whenever he has no property to assess as named on such item, and no item shall be passed without being answered."

Personal Property—Chattels.

8. *All shares of stock in any corporation formed outside of this State; and also all shares of stock in any corporation formed in this State and conducting its business outside this State.....*

DEMURRER TO COMPLAINT.

As the courts and taxing authorities of Indiana had always held that stock in a corporation held by an individual was property separate and distinct from the capital stock or tangible property of the corporation, and that, under these sections, such stock, if in a foreign corporation, must be listed for taxation, even though the capital stock and tangible property of such foreign corporation were assessed to such corporation in some other State, or even in Indiana, while if in a domestic corporation it was exempt, unless the domestic corporation went out of the State to do business, the defendants below promptly challenged the constitutionality of the law by demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them or either of them. (Tr. p. 32.) In the body of the demurrer the reasons for their contention that, insofar as it discriminates, the law was unconstitutional, were stated as follows:

“VI. That it appears upon the face of the complaint that the back assessment of the taxes

sought to be collected was made by the officers of Marion county in pursuance to a statute of this State, which provides for the taxation of shares of stock in a foreign corporation, owned by inhabitants of this State, regardless of whether the property of the corporation was taxed in a foreign State or not, and which said statute at the same time exempted or exempts from taxation shares of stock of like nature and character in a domestic corporation, and that this is an arbitrary discrimination and in violation of Article 1, Section XIV. of the amendments to the Constitution of the United States.

VII. That it appears upon the face of the complaint that the back assessment of the taxes sought to be collected was made by the officers of Marion county in pursuance to a statute of the State, which provides for the taxation of shares of stock in a foreign corporation, owned by inhabitants of this State, regardless of whether the property of the corporation was taxed in a foreign State or not, and which said statute at the same time exempted or exempts from taxation shares of stock of like character and nature in a domestic corporation, and that this is an arbitrary discrimination against stock having its origin in a foreign State and in violation of the commerce clause, Section 8, Article 1, of the Constitution of the United States.

VIII. That the statute under which plaintiff sues the defendant herein, as construed by the Supreme Court of Indiana, in *Hasely v. Ensley*, 82 N. E. Rep. 809-12, where it says '*a clear intent and purpose*' was manifested on the part of the Legislature '*to distinguish* between shares of stock in a foreign corporation and shares of stock in a domestic corporation' is unconstitu-

tional, null and void, and openly and notoriously violates the commerce clause of the Federal Constitution, Section 8, Article 1." (Tr. p. 33.)

The trial court held that there was no discrimination and overruled the demurrer. (Tr. p. 34.) An appeal was taken to the Supreme Court of Indiana (Tr. p. 37), and that Court sustained the action of the court below, and held that the taxing statutes of Indiana did not discriminate against foreign stock and did not violate either the Fourteenth Amendment to or the commerce clause of the Constitution of the United States. (Tr. pp. 41 to 48.) A petition for rehearing was overruled April 21, 1910. (Tr. p. 41.)

Isaac M. Darnell having died while this litigation was in progress, Henry Y. Darnell, executor of the estate of Isaac M. Darnell, deceased, and Walter S. Darnell, on the 23d day of May, 1910, filed a petition for a writ of error from this Court to the Supreme Court of Indiana, in which petition, as proving a right in the executor to this writ, it was shown:

"That since the submission of the above entitled cause, the appellant, Isaac M. Darnell, died on or about the 24th day of January, 1910, while a resident of the State of Tennessee; that Henry Y. Darnell, petitioner herein, was duly appointed executor of the last will and testament of the said Isaac M. Darnell, and was duly qualified, and as such executor now has the possession of the property of the said Isaac M. Darnell and is responsible and answerable for his debts, including the judgment rendered in this cause; that he has heretofore filed in this Court

a duly certified copy of his appointment as such executor." (Tr. p. 49.)

The writ of error was allowed as prayed by Mr. Chief Justice Hadley of the Supreme Court of Indiana and ordered to act as a supersedeas upon the plaintiffs in error entering into bond in the sum of \$20,000. (Tr. p. 51.)

The bond was filed and approved (Tr. pp. 52, 53), citation issued and served (Tr. pp. 53, 54), assignment of errors filed (Tr. pp. 55, 56), and the cause removed to this Court.

As a part of our statement of the case and as showing the evident purpose and intention of the Legislature in taxing foreign stock, while exempting like property of domestic origin, we will quote two brief statements from the Appellate and Supreme courts of Indiana.

In *Hasely, Executor, v. Ensley, Treas.*, 40 Ind. App. 598, the Appellate Court of Indiana said that the taxing laws of Indiana—

“manifest a *clear intent and purpose* upon the part of the Legislature to *distinguish* between shares of stock in a foreign corporation and shares of stock in a domestic corporation.” (Italics ours.)

And the Supreme Court of Indiana has, in effect, frankly admitted that, in their operation on foreign and domestic stock, the taxing laws of Indiana were an application of the protective theory by the State. In *Cook v. Board of Com'rs.*, 92 N. E. 876, 878, the Supreme Court said:

“It is also urged that we ought to give the act a construction which would avoid double taxation. Perhaps as an argument of justice and expediency that would be true, but we are confronted with another rule of construction, to-wit, that every part of a statute shall if possible be given force, and it is only by the construction heretofore given the act, and here followed, that this can be done, and we must assume that the Legislature so intended. As a counter-argument upon the question of expediency, *it is not beyond the range of high probability that this clause was inserted to encourage investors to invest their means in domestic corporations doing business in this State, or in the jurisdiction where the government furnishes protection to them and their property, and the educational facilities and transportation agencies of modern social and industrial life. At any rate, we are quite satisfied that the assessment was valid.*” (Italics ours.)

SPECIFICATION OF ERRORS.

The errors relied upon for the reversal of this cause are correctly stated in the assignment of errors, as follows:

I.

The Court erred in holding that the provisions of Chapter 128 of Burns' Revised Statutes, 1908, of the State of Indiana, being Sections 10140 to 10434, and particularly Sections 10143, 10199 and 10202, as construed by the Appellate and Supreme courts of said State, the same being the taxing statutes of said State, did not discriminate against the owner and holder of stock (and shares of stock) in foreign corporations in favor of the owner and holder of stock (and shares of stock), in domestic corporations, so as to be a burden on interstate commerce, and that said tax statutes were not in conflict with the provisions of Section 8 of Article I, of the Constitution of the United States, which provides—

“the Congress shall have power * * *
to regulate commerce with foreign nations,
among the several States, and with the Indian
tribes,”

for that the State of Indiana by and through the provisions of said taxing statutes as applied, enforced and construed, seeks to and does unlawfully burden and discriminate against shares of stock in foreign corporations and also the ownership, sale and transfer of said shares of stock in foreign corpora-

tions in favor of shares of stock and the ownership, sale and transfer of said shares of stock in domestic corporations—all in violation of said Section 8 of Article 1 of the Constitution of the United States, above set forth.

II.

The Court erred in holding that the provisions of the said taxing statutes of the State of Indiana, and particularly of Sections 10143, 10199 and 10202 thereof, as construed by the Supreme Court of said State, are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

“Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws.”

for, that the State of Indiana, by and through the provisions of said taxing statutes in operation and as carried out by the taxing officers and as construed, seeks to and does unlawfully burden and discriminate against shares of stock in foreign corporations and the ownership, sale and transfer of shares of stock in foreign corporations in favor of shares of stock and the ownership, sale and transfer of shares of stock in domestic corporations, in violation of said Section 1 of the Fourteenth Amendment to the Constitution of the United States, above set forth.

III.

The Court erred in giving judgment for the State of Indiana and against appellants and plaintiffs in error, when, by the law of the land, the said judg-

ment ought to have been given for the appellants and plaintiffs in error and against the said State of Indiana.

POINTS AND AUTHORITIES.

The Taxing Statutes of Indiana, as Construed by the Courts of That State, Violate the Commerce Clause of the Federal Constitution.

I.

Shares of stock in a corporation are property. The owner of such shares owns and holds them as property separate and distinct from the capital stock and tangible property of the corporation.

Seward v. City of Rising Sun, 79 Ind. 351.

Darnell v. State (Ind. Sup. Ct.) 90 N. E. 769.

Hasely, Executor, v. Ensley, Treas., 40 Ind. App. 598.

Bank of Commerce v. Tennessee, 161 U. S. 134, 146.

Farrington v. Tennessee, 95 U. S. 679, 687.

II.

As such shares have a value independent of the party owning them and are transported, held, bought, sold and taxed like other property, they are subjects of interstate commerce.

Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

Farrington v. Tennessee, 95 U. S. 679, 687.

Bank of Commerce v. Tennessee, 161 U. S. 134, 146.

People v. Reardon, 184 N. Y. 431.

- People v. Reardon, 204 U. S. 152.
 Hasely, Executor, v. Ensley, Treas., 40 Ind.
 App. 598.
 Champion v. Ames, 188 U. S. 321, 47 L. Ed.
 492.
 International Text Book Co. v. Pigg, 30 Sup.
 Ct. Rep. 481.

III.

When the statute of a State, as construed by the courts of that State, places a greater or more onerous burden upon property coming from a foreign State than is imposed upon like property of domestic origin, it is void, insofar as it discriminates, because in conflict with the commerce clause of the Constitution of the United States.

- I. M. Darnell & Son Co. v. Memphis, 208 U. S.
 113, 52 L. Ed. 413.
 Webber v. Virginia, 103 U. S. 344, 26 L. Ed.
 565.
 Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743.
 Walling v. Mich., 116 U. S. 446, 29 L. Ed. 691.

IV.

The protection afforded by the commerce clause of the Constitution is not withdrawn or suspended after the property of foreign origin has acquired a permanent situs in the State and is commingled with and merged into the general mass of property therein. It continues "until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character."

- Welton v. Missouri, 91 U. S. 275.
 Darnell v. Memphis, 208 U. S. 113, 52 L. Ed.
 413.

V.

The powers granted to the Federal government and the corresponding limitation of the powers of the various States are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted. "They keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances."

Pensacola, etc., Co. v. Western, etc., Co., 96 U. S. 1, 24 L. Ed. 708.

VI.

The commerce clause was made a part of the Constitution to insure, as nearly as was consistent with the reserved police powers of the States, absolute freedom of commercial intercourse within the boundaries of the United States. Under it the States are powerless to avail themselves of the protective principle or theory, directly or indirectly.

Gibbons v. Ogden, 9 Wheat. 1.

Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743.

Cook v. Marshall County, 196 U. S. 261, 49 L. Ed. 471.

Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565.

Walling v. People of Michigan, 116 U. S. 446, 29 L. Ed. 691.

Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257.

VII.

As the taxing statutes of Indiana as construed by her courts require *all* shares of stock in foreign corporations to be listed for taxation, while exempt-

ing from taxation like shares of stock in domestic corporations, they violate the commerce clause of the Constitution of the United States.

See authorities under points 3 and 6.

VIII.

The Supreme Court of Indiana has practically admitted that the taxing statutes of that State were so framed as to call into play the protective theory.

Cook v. Board (Ind. Sup. Ct.), 92 N. E. 876, 878.

IX.

And the Indiana Appellate Court has frankly stated (and the case has been expressly approved by the Supreme Court in Cook v. Board, 92 N. E. 876), that the acts of the Legislature "*manifest a clear intent and purpose * * * to distinguish between shares of stock in a foreign corporation and shares of stock in a domestic corporation.*"

Hasely, Executor v. Ensley, Treas., 40 Ind. App. 598.

X.

The mere fact that when a domestic corporation goes into another State and establishes an industry the law requires the stockholders in such corporation to list their stock for taxation, does not disprove the charge of discrimination. It is simply further evidence, if more were necessary, that the State of Indiana is attempting, in plain violation of the Federal Constitution, to build up home industries by the application of the protective theory.

XI.

The question presented here was not raised, discussed or decided in *Kidd v. Alabama*, 188 U. S. 730, or *Wright v. Louisville Ry. Co.*, 195 U. S. 219.

The taxing statutes of Indiana, as construed by the courts of that State, violate the Fourteenth Amendment to the Constitution of the United States.

I.

While the equal protection clause of the Constitution permits classification for purposes of taxation, it forbids an arbitrary classification—a classification without substantial basis. Like property under like circumstances and conditions must be treated alike, both in the privileges conferred and the liabilities imposed. Where an act of the Legislature discriminates, it is void to that extent.

Southern Ry. Co. v. Greene, 30 Sup. Ct. Rep. 287, 291.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

Barber v. Connolly, 113 U. S. 27, 31.

Home Ins. Co. v. New York, 134 U. S. 594.

II.

The case at bar is to be distinguished from the case of *Kidd v. Alabama*, 188 U. S. 730, and *Wright v. Louisville, etc., Ry. Co.*, 195 U. S. 219, upon two grounds. First. In those cases stock in foreign corporations was not required to be listed for taxation if the foreign corporation was doing business and was taxed in the State whose statute was attacked, while under the Indiana statute *all* stock in foreign

corporations must be listed. Second. In Indiana the manifest intent and purpose of the act is the development of home industries, not by legitimate inducements, but by discrimination carried so far as to even penalize the owners of stock in domestic corporations when such corporations go out of the State to do business.

ARGUMENT.

The Indiana Statutes Violate the Commerce Clause of the Constitution.

We have elsewhere in this brief set out in full the various sections of the Indiana statutes having a bearing on the questions presented by the case at bar.

By Section 10143 of Burns' Rev. Stat. 1908 (Section 8411 B. R. S. 1901) it is provided that for purposes of taxation personal property shall include, amongst many other things:

"All shares in corporations organized under the laws of this State when the property of such corporations is not exempt or is not taxable to the corporation itself; * * * all shares in foreign corporations except national banks, owned by inhabitants of this State. * * * Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder."

Section 10199 Burns' Rev. Stat. 1908 (Section 8460 B. R. S. 1901) sets forth the various things that must

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be enumerated in making up the statement for taxation. The second and third items under the heading "Personal Property—Chattels" are as follows:

"Second. All shares in foreign corporations, other than banks, and their value.

Third. All shares in other corporations, organized under the laws of this State, when the property of such corporations is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares."

Section 10202 of Burns' Rev. Stat. 1908 contains a long schedule in which is set out with great detail the property that must be returned for taxation. Under the heading "Personal Property—Chattels" is the following:

"8. All shares of stock in any corporation formed outside of this State, and also all shares of stock in any corporation formed in this State and conducting its business outside this State."

Under these statutory provisions and the decisions of the courts construing them all stock in foreign corporations must be listed for taxation by the owners thereof, while the owners of stock in domestic corporations are exempted from such liability, unless it should appear that the domestic corporation in which stock is owned had gone outside of the State of Indiana to conduct its business. The provision last quoted is the controlling one and under it foreign stock is never exempt, not even though the foreign corporation had its factory located in Indiana and paid all of its taxes there.

In *Hasely, Executor, v. Ensley, Treas.*, 40 Ind. App. 598, the Appellate Court of Indiana construed the provisions above mentioned and its construction has been followed by the Supreme Court and is the settled law in that State. In that case the Court was asked to hold that foreign stock was not assessable when all the property of the corporation was taxable to the corporation of a foreign State. This construction was urged because of that provision in the first section above quoted, reading "shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder." It was held, however, that this was not intended to apply to foreign corporations, the Court saying:

"It does not declare that shares of stock in a foreign corporation shall, *under any circumstances*, be exempt from taxation."

The Court went even further and held that the provisions of the other sections requiring *all* foreign stock to be listed clearly showed that the Legislature intended that foreign stock, under any and all circumstances, must be listed for taxation; that the fact that the Legislature required all foreign stock to be placed on the tax duplicate conclusively showed an intention that such stock should be subject to taxation. In the course of its opinion, the Court said:

"Banks were excepted, and why would not all of the exceptions that the Legislature intended should attach to this class of property be included in the same sentence? If it was intended that

shares in the capital stock of a foreign corporation should stand in that respect upon the same footing with shares in a domestic corporation, why was not the same language used by the Legislature in expressing that purpose that was used with reference to domestic corporations?"

And in the same opinion the Court says:

"Those sections of the taxing law that regulate the listing and return of property for taxation, that provide for the placing of the property upon the tax duplicate, and the collection of the taxes, give a more correct and reliable view of the legislative purpose in this respect than is afforded by the provisions of Section 8411, *supra*, whose purpose it was to define the meaning of the term 'personal property.' It is these provisions of the law that place the property upon the tax duplicate, and that duplicate is a warrant in the hands of the treasurer, imposing upon him the duty of enforcing the payment of the taxes assessed. *It is not to be presumed that the Legislature would require the placing of property on the tax duplicate and require the officer to proceed to collect the taxes assessed against it, if it did not intend that such property should be subject to taxation.*" (Italics ours.)

It was urged that the law required the listing of all stock in foreign corporations either for statistical purposes or for the purpose of putting the assessor upon inquiry and furnishing information to him by which he might ascertain whether the shares of stock in foreign corporations were subject to taxation or not, but the Court held such theory wholly unten-

able, as there were special provisions of the statute relating to the collection of statistics, and said:

“It is utterly unreasonable to suppose that the taxpayer is required to list all of his shares of stock in foreign corporations, not for the purpose of taxation, but for the purpose of enabling the assessor to ascertain whether they are subject to taxation.”

Under the law every share of stock in a foreign corporation, no matter what taxes the corporation pays or where it pays them, must be placed upon the tax duplicate, not for the purpose of investigation to see whether or not it is liable for taxation, *but for the purpose of being taxed*. Once listed there is no one with authority to say that some of it is exempt, but the tax duplicate becomes a warrant in the hands of the treasurer, imposing upon him the duty of enforcing payment of taxes on the property listed.

There is no way of avoiding the conclusion that the taxing laws of Indiana discriminate against stock in foreign corporations. This is recognized by the Court from whose opinion we have quoted, for it is in that opinion freely admitted that the taxing statutes of Indiana—

“manifest *a clear intent and purpose* upon the part of the Legislature to *distinguish* between shares of stock in a foreign corporation and shares of stock in a domestic corporation, *and to subject all shares of stock in foreign corporations, except stock in banks, to taxation in this State.*” (Italics ours.)

And in the concluding paragraph of the opinion the Court says:

“These provisions of the law to which we have referred show an unmistakable legislative purpose to assess shares of stock in non-resident corporations for taxation, although it may result in double taxation.”

The Supreme Court of Indiana has expressly approved and followed this case, and in a recent decision stated, in effect, that the taxing laws of Indiana were framed with the evident purpose of encouraging investors to invest their means in domestic corporations doing business in that State. The case referred to is that of *Cook v. Board of Com'rs.*, 92 N. E. 876, 878, where the Court used the following language:

“It is also urged that we ought to give the act a construction which would avoid double taxation. Perhaps as an argument of justice and expediency that would be true, but we are confronted with another rule of construction, to-wit, that every part of a statute shall if possible be given force, and it is only by the construction heretofore given the act, and here followed, that this can be done, and we must assume that the Legislature so intended. As a counter argument upon the question of expediency *it is not beyond the range of high probability that this clause was inserted to encourage investors to invest their means in domestic corporations doing business in this State*, or in the jurisdiction where the government furnished protection to them and their property, and the educational facilities and transportation agencies of modern social and industrial life. At any rate, we are quite satisfied that the assessment was valid.” (Italics ours.)

A manifest purpose and intent to "distinguish" between foreign and domestic stock can only refer to a discrimination against one in favor of the other. That the word was used in that sense by the Appellate Court is clear and such use is approved by the standard dictionaries. It certainly does not refer to a difference in value or in physical characteristics. It is clear also that "encouragement" to invest in domestic stock carries with it inevitably the idea of "discouraging" investments in foreign stock, and it follows that when the Supreme Court of Indiana is driven to the conclusion that the taxing laws of that State were framed and designed with the evident purpose of encouraging investors to invest in the stock of domestic corporations, it admits that there is discrimination against like property of foreign origin. The question is, therefore, squarely presented as to whether a discrimination against stock in foreign corporations in favor of like stock in domestic corporations violates the commerce clause of the Constitution.

While we do not feel that there can be any question upon the proposition that shares of stock in corporations are subjects of commerce and are protected by the commerce clause of the Constitution, yet, as the Supreme Court of Indiana expressed a doubt upon this question, we will consider that objection briefly. In the opinion below (Tr. p. 46) the Court said:

"We can scarcely conceive that the framers of the Constitution, in conferring upon Congress the power to regulate commerce among the sev-

eral States, had in contemplation such subject as shares of stock in a private corporation, which are not sold upon the markets in competition with shares of stock in domestic corporations, but whose value must in any given case depend upon the personal management, and the financial and other conditions of the particular corporation."

The complaint shows that the particular shares in question had a value of \$100 per share, and that they were shares in a Tennessee corporation. It is not alleged that the stock of such corporation was not for sale and neither does it appear what business it was engaged in. We submit that the Court knows judicially that shares of stock are bought and sold like other property. It is a matter of common knowledge and has been recognized by the courts repeatedly:

"Shares of stock in a corporation are property separate and distinct from the property of the corporation itself. They are the property of the holder of the shares, over which he has entire dominion. They may be made subject to taxation, of barter and sale, of the crime of larceny, and may be replevied, as other personal property may be."

Hasely, Executor, v. Ensley, Treas., 40 Ind. App. 598.

"The shares are held and may be bought and sold and taxed like other property."

Farrington v. Tennessee, 95 U. S. 679, 687.

In *People v. Reardon*, 184 N. Y. 431, the Court spoke of such shares as being "property extensively bought and sold throughout the State." In affirm-

ing that case (*People v. Reardon*, 204 U. S. 152), this Court recognized that stock in a corporation is property that is the subject of interstate commerce. The stamp tax there in question was held valid, as it did not discriminate in favor of domestic commerce.

The Supreme Court of Indiana has stated that it was not beyond the range of high probability that the taxing laws of that State were intended "to encourage investors to invest their means in domestic corporations." If foreign stock was not sold in Indiana why resort to discrimination for the purpose of inducing investment in domestic stock? If it is a fact that shares in foreign corporations are not sold upon the markets in Indiana in competition with domestic stock, it is due entirely to discriminating taxation, and if that fact is considered important we submit that the State cannot take advantage of a situation due to its discriminatory legislation.

Interstate commerce does not necessarily mean the buying and selling of property. In *International Text-Book Co. v. Pigg*, 30 Sup. Ct. Rep. 485, this Court quoted with approval the following:

"All interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce."

And in *Guy v. Baltimore*, 100 U. S. 434, in holding an ordinance authorized by the State void because discriminating in wharfage charges against vessels carrying the products of other States, this Court said:

"No State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory." (*Italics ours.*)

The bare statement of this Court's reasons for holding that insurance policies were not subjects of interstate commerce seems to us sufficient to conclusively establish that shares of stock in a corporation are. The Court, speaking through Mr. Justice Field, said of such policies:

"These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale."

Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

In holding that lottery tickets were subjects of interstate commerce, after an exhaustive review of the authorities, this Court said:

"They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same re-

strictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it."

Champion v. Ames, 188 U. S. 321, 353, 47 L. Ed. 492, 500.

Even though the framers of the Constitution did not have commerce in shares of stock in mind when they drafted that instrument, as is suggested by the Supreme Court of Indiana, the powers granted are not confined to commerce, as it then existed, but extend to and embrace instrumentalities then unknown. The question is, are they *now* articles of commerce?

"Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

Pensacola, etc., Co. v. Western, etc., Co., 96 U. S. 1, 24 L. Ed. 708.

The taxing statutes of Indiana were intended to be and in their operation and effect are an application of the protective theory by the State. The commerce clause was intended to end once and for

all the exercise of such power by the States. Commerce, under the Confederacy, where the States were free to tax and discriminate as they saw fit, was brought to a most "oppressed and degraded" state. This was the compelling cause of the adoption of the Constitution and the commerce clause was inserted to insure commercial freedom:

"The power of Congress to regulate commerce among the States is perhaps the most benign gift of the Constitution. Indeed, it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial States of exacting duties upon the importation of goods destined for the interior of the country or for other States. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into States, but the evil had already become so flagrant that it threatened an utter dissolution of the Confederacy. The article was adopted that all the States of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country."

Cook. v. Marshall County, 196 U. S. 261, 272, 49 L. Ed. 471, 475.

"In view of these and other decisions of this Court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other

States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

If this were not so it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired. 'Over whatever other interests of the country,' said Mr. Webster, 'this government may diffuse its benefits and blessings, it will always be true, as matters of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system.' But State legislation, such as that indicated in the cases which have been cited, if maintained by this Court, would ultimately bring our commerce to that 'oppressed and degraded state' existing at the adoption of the present Constitution, when the helpless confederation was abandoned and a national government instituted, with full power over the entire subject of commerce, except that wholly internal to the States composing the Union."

Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743, 745.

In *State v. North*, 27 Mo. 464, the Supreme Court of Missouri held unconstitutional and void an act which imposed a tax upon merchants as to all goods purchased by them except such as were grown or manufactured in the State of Missouri. The Court said:

“But, whatever may be the motive for the tax, whether revenue, restriction, retaliation *or protection of domestic manufactures*, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the State is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to these subjects. Can any power more destructive to the Union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences.” (Italics ours.)

In *Webber v. Virginia*, 103 U. S. 344, 350, this Court declared unconstitutional an act which required the agents of foreign manufacturers to take out a license, but exempted the agents of domestic manufacturers from such liability, saying:

“By these sections, read together, we have this result: The agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a special tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufac-

turers, and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States."

The concluding paragraph of that opinion reads:

"Commerce among the States in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens, imposed by local authority, by reason of its foreign growth or manufacture."

In *Walling v. Michigan*, 116 U. S. 446, this Court declared void an act similar in principle to the one complained of here. The Court in that case said:

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first

mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

The case of *Brown v. Houston*, 114 U. S. 622, cannot be relied upon as supporting the contention of the defendant in error. The tax law considered in that case was held not to be unconstitutional, as—

"it was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana."

And the goods taxed were—

"subjected to no discrimination in favor of goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

The next point made by the Supreme Court of Indiana, in holding that there was no violation of the commerce clause of the Constitution, is that the property had become a constituent part of the property and wealth of the State, or, in other words, that it was at rest, commingled with and merged into the general mass of property in the State. Upon this point (Tr. p. 46) we quote from the opinion:

"It is alleged that appellant, Isaac M. Darnell, had resided and owned and held such stock in this State for several years, and it had thus acquired a permanent situs and become a part of the property of the State. Our tax law does not purport to deal with holdings of corporate

stocks as articles of commerce and imposes no tax or burden thereon as a condition or incident of importing such property into the State. The tax is authorized only against residents of the State subject to taxation, upon holdings of foreign stocks which have become a constituent part of the property and wealth of the State."

We admit that this property under the circumstances stated was not exempt from taxation because of its foreign origin, but we submit that under the decisions of this Court the mere fact that property of foreign origin has acquired a permanent situs in a State and become commingled and merged into the general mass of property in the State, does not preclude an investigation into the question as to whether or not, on account of its foreign origin, it is discriminated against by the taxing laws of the State. The power granted to the Federal government by the commerce clause and the protection afforded by it is not withdrawn or suspended by the mere fact that the property of foreign origin has become a constituent part of the property of the State. It continues until the property has ceased to be the subject of discriminating legislation by reason of its foreign origin. This question was decided by this Court in the case of *Welton v. Missouri*, 91 U. S. 275, where an act was held void which required the payment of a license fee from those who dealt in goods, wares or merchandise not grown or manufactured in Missouri. Upon this particular question the Court said:

"It is sufficient to hold now that the commercial power continues until the commodity has

ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."

In our opinion, the case at bar cannot be distinguished from the case of *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113, in which this Court held that the State of Tennessee could not tax the product of the soil of foreign States, while exempting like property when produced from the soil of Tennessee. The Supreme Court of Tennessee, in upholding the tax, made practically the same argument as that quoted above from the opinion of the Supreme Court of Indiana. For the purpose of comparison, we quote from the opinion of the Tennessee Court (*Darnell v. Memphis*, 116 Tenn. 424), on page 429:

"It had become divested of any connection with commerce between the States and was at rest, commingled with and merged into the general mass of property of this State."

And on page 443 the Court said:

"Therefore, conceding that the State may not burden or in any way interfere with transactions or property so long as they relate to or are the subjects of commerce between the States, nevertheless, when such transactions are divested of their interstate character and the property has ceased to be a part of commerce between the States, or to have any connection therewith, and has become merged into and a part of the general mass of property in the State, there can be no denial of the equal protection of the Su-

preme law, prohibiting interference with or the placing of burdens upon commerce between the States, for the reason that the Federal Constitution no longer operates upon such transactions or protects such property from the taxing power of the State."

The fallacy underlying this argument was pointed out by this Court in language so plain that there can be no mistake as to the holding of the Court. After quoting from the opinion of the Supreme Court of Tennessee, the Court, speaking through Mr. Justice White, said:

"As we are of opinion that the question for decision is clearly foreclosed by prior decisions of this Court, which demonstrate that the court below misconceived the rulings of this Court upon which it relied, we do not stop to analyze the reasoning of the Court, considered as an original proposition, but come at once to test its correctness by making a brief review of the decided cases relied upon by the court below, and others, not referred to, which relate to the subject, and which are controlling.

As a prelude to a review of the cases referred to, we observe that while it is undoubted that it has been settled that where property which has moved in the channels of interstate commerce is at rest within a State and has become commingled with the mass of property therein, it may be taxed by such State without thereby imposing a direct burden upon interstate commerce, that doctrine, as expounded in the decided cases, including those relied upon by the court below, has always expressly excluded the conception that a State could, without directly

burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature.

The leading cases announcing the doctrine that a State may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are *Woodruff v. Parham* and *Brown v. Houston*, *supra*. But in both those cases it was sedulously pointed out that the power which was thus recognized did not and could not include the authority to burden the property brought from another State with a discriminating tax. In *American Steel & Wire Co. v. Speed*, 192 U. S. 519, 48 L. Ed. 546, 24 Sup. Ct. Rep. 365, where the doctrine of *Woodruff v. Parham* and *Brown v. Houston* was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another State, even after it had come at rest within a State, from being a direct burden upon interstate commerce, property so situated must be taxed 'without discrimination, like other property situated within the State.'

The statements just made adequately point out the misconception as to the rulings of this Court upon which the court below placed its conclusions, since the Court took no heed of the express declaration concerning the nullity of any discriminating tax, made in the cases which the Court relied on."

The Court then reviews the decisions, demonstrating that the doctrine announced by the Supreme Court of Tennessee had never been recognized by this Court, and continued:

"In this connection we excerpt from the opinion in *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, statements which directly relate to the subject in hand and which conclusively demonstrate the unsoundness of the proposition which the court below upheld; that is, that the commerce clause of the Constitution does not protect property brought from another State from being discriminated against after it has arrived and been commingled with the mass of property within the State of its destination. Commenting upon the reasoning of the opinion in *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164, the Court said (p. 341):

"When the latter (imported goods) become mingled with the general mass of property in the State, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. When mingled with the general mass of property in the State they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347, that goods brought into a State for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the State or because they are the products of another State. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts,

or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking, or any other employment. But that is an entirely different thing from paying a special tax upon his receipts in a particular employment. If such a tax is laid and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it.'

As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other States brought into the State of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause of the Fourteenth Amendment. The judgment be-

low must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

We respectfully and earnestly submit that this case is decisive on the question presented here, and if followed must lead to a reversal and a holding that the State of Indiana cannot tax stock in foreign corporations, while exempting like stock in domestic corporations.

It was insisted in the court below and will probably be urged here that the tax law of Indiana did not discriminate against stock in foreign corporations for two reasons. First, because domestic corporations were taxed on the property owned by them; that as the corporation was required to file a statement showing the market value of its capital stock and as any excess in such value over the value of the tangible property of the corporation was assessed to it, there was no discrimination. Second, that because the owners of shares in domestic corporations that had established their business in a foreign State were required to list such stock for taxation, there was no discrimination.

While we do not consider that there is any merit in either of these contentions, we shall consider them briefly in the order stated, as they will probably be seriously urged upon the Court by opposing counsel.

Section 10161, Burns' Rev. Stat. 1908, provides for the taxation of corporations. It reads as follows:

"All corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this State is situated shall be deemed its residence, but if there be no principal office in the State, then such property shall be listed and taxed at any place in the State where the corporation transacts business."

Sections 10233 and 10234, Burns' Rev. Stat. 1908, govern domestic corporations in making returns for taxation. The first section requires them to list for taxation.

"Sixth. The value of all tangible property.

Seventh. The difference in value between all tangible property and the capital stock."

The last section mentioned provides that:

"In all cases where the capital stock of any such corporation exceeds in value that of the tangible property listed for taxation, then such capital stock shall be subject to taxation upon such excess of value; where no tangible property is returned or found, and the capital stock has a value, it shall be assessed for its true cash value. But where the capital stock or any part thereof is invested in tangible property, returned for taxation, such capital stock shall not be assessed to the extent that it is so invested. Every franchise or privilege of any such corporation shall likewise be assessed at its true cash value. Where the full value of any franchise is represented by the capital stock listed for taxation then such franchise shall not itself be taxed, but in all cases where the franchise is

of greater value than the capital stock, then the franchise shall be assessed at its full cash value, and the capital stock in such case shall not be assessed."

It is contended that because the domestic corporation, in those few cases where the value of its capital stock is greater than the value of its tangible property, is taxed *to the extent of such excess value*, that the tax laws of Indiana are not open to the charge of discrimination because requiring individuals owning foreign stock to list it for taxation while exempting individuals owning like property of domestic origin from such liability. We submit that the obvious discrimination of the Indiana taxing statutes cannot be ignored or counterbalanced by showing that under certain very improbable circumstances a fractional part of the value of the capital stock of the domestic corporation might be assessed for taxation against it. Aside from this, however, it has always been held in Indiana that shares of stock in the hands of the individual owner thereof are property separate and distinct from the capital stock or tangible property of the corporation. This being true, how can a discrimination between the owners of foreign and domestic stock be overlooked or excused because the domestic corporation, a separate and distinct entity, has paid certain taxes on *its* property—property separate and distinct from that of the owner of the shares of domestic stock? Even though by some subtle process of reasoning not clear to us this could be done, it would only remove the stigma of discrimination in those few cases where the cap-

ital stock of the corporation exceeded in value the tangible property of the corporation, and even then only as to the excess value, which alone is taxed in such cases to the corporation. So, even though the contention of opposing counsel be adopted it would not avail to save the law from the charge of discrimination. It must be remembered, also, that no matter what taxes are paid in Indiana by a foreign corporation, the owners of its stock living in Indiana must list it for taxation. The foreign corporation may have paid more in taxes to the State of Indiana than the domestic corporation, but when the owner of the stock in the foreign corporation is handed the tax schedule provided by law, he finds himself confronted with the direct and positive command to list "*all* shares of stock in *any* corporation formed outside of this State." There is no one with authority to say that any of those shares are exempt from taxation, but, by operation of law, this tax schedule or duplicate becomes in the hands of the treasurer of the county a warrant imposing upon him the duty to collect the taxes assessed on the property therein listed. On the other hand, when the owner of stock in the domestic corporation is handed his tax schedule he finds that he is exempt, unless it should happen that he owned "shares of stock in any corporation formed in this State and conducting its business outside this State."

Taking up the second reason urged by opposing counsel in support of their position that the Indiana tax laws are not discriminatory, they say that because the tax laws of Indiana require the owner of

stock in a domestic corporation that has gone outside of the State to conduct its business to list such stock for taxation, it shows that there is no discrimination. As a matter of fact, in view of the settled law that shares of stock are property separate and distinct from the capital stock and tangible property of the corporation, we do not see how a showing that in extreme cases there might be *some* domestic stock that must be listed would disprove a charge of discrimination when *all* foreign stock must be listed. We feel confident that a careful consideration will tend to convince this Court that, instead of this feature being evidence that there is no discrimination, it is almost conclusive evidence that the law is discriminatory and points unerringly to the motive for such discrimination. The provision of the statutes referred to, it is significant to note, is a part of the provision which requires all stock in foreign corporations to be listed for taxation. It is contained in the schedule set out in the statutes, which is final on the question as to what is subject to taxation. It reads:

“All shares of stock in any corporation formed outside of this State, and also all shares of stock in any corporation formed in this State and conducting its business outside this State.”

It seems to us perfectly obvious that this piece of legislation is an unlawful attempt on the part of the State of Indiana to apply indirectly the protective theory with the idea of building up home industries. This is recognized by the Indiana Appellate Court in the case of *Hasely, Executor, v. Ensley, Treas.*, from

which we have quoted at length. It is also recognized by the Supreme Court of Indiana in the recent case of *Cook v. Board*, 92 N. E. 876, 878, where they say:

“It is not beyond the range of high probability that this clause was inserted to encourage investors to invest their means in domestic corporations doing business in this State.”

First, *all* stock in foreign corporations must be listed for taxation. This with the evident intention of discriminating against such stock because of its foreign origin, thereby indirectly encouraging investment in the stock of domestic corporations. Second, stock in domestic corporations is exempt until they establish industries in other States, in which event it must be listed by the owners for taxation. The evident purpose of this clause is to discourage the establishment of industries in other States and encourage the establishment of industries in Indiana.

We confidently and respectfully submit that so long as the State of Indiana exempts domestic stock from taxation it cannot tax foreign stock, and that insofar as it thus discriminates the tax law of Indiana violates the commerce clause of the Constitution.

The Indiana Statutes Also Violate the Fourteenth Amendment to the Constitution.

The question as to whether the Indiana tax laws unlawfully discriminate against stock in foreign corporations in favor of stock in domestic corporations is quite fully covered in the discussion as to the violation of the commerce clause and for that reason

it is not necessary to enter into it here. We admit that these shares of stock were subject to taxation and that for that purpose the equal protection clause of the Constitution permits classification. This classification, however, must be based upon some real and substantial distinction having a reasonable and equitable relation to the things in respect to which the classification is imposed. This Court has frequently had occasion to indicate the latitude allowed in such cases.

“While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. * * * We hold, therefore, that to tax the foreign corporations for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State does violence to the Federal Constitution.”

Southern Railway Co. v. Greene, 30 Sup. Ct. Rep. 287, 291.

“But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. *All corporate*

securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. *But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition.*" (Italics ours.)

Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 240, 33 L. Ed. 892, 895.

"But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation.

Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, *it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected.* Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. *There is no discrimination in favor of one against another of the same class."* (Italics ours.)

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. Ed. 1025, 1032.

The case at bar comes within the rule laid down in Southern Railway Co. v. Greene, quoted above, and that case should be considered as modifying the decision of this Court in the earlier case of Kidd v. Alabama, 188 U. S. 730. In principle the cases are practically identical. But even though the Court should feel that the decision in Southern Railway Co. v. Greene cannot be considered as going that far, we would suggest that there is a substantial distinction between the case of Kidd v. Alabama and this, in that under the laws of the State of Alabama then under consideration the shares in foreign corporations that paid taxes in Alabama were treated the same as shares of stock in Alabama corporations. That this is true is apparent from the decision of the

Alabama Supreme Court (State v. Kidd, 125 Ala. 413, 423), where it is said:

“By the Code of 1886, capital stock in domestic corporations is made taxable against the corporation itself, with deductions on account of other property which they are required to list for taxation. Section 453, Subd. 9, and Section 478. Subdivision 8 of Section 451 directs that *‘the shares of the capital stock of any company or corporation which is required to list its property for taxation in this State shall not be assessed against the shareholders of such company or corporation.’* This clause applies in terms to shares of a particular class, and has no reference to corporations having no property to list for taxation in this State. *McIver v. Robinson*, 53 Ala. 456. The exemption and likewise the distinction between the two classes of corporations could only have been inspired by the consideration that the burden certainly imposed by our laws on property of the corporation would indirectly diminish the value of its stock, while in the case of a corporation having no property within the jurisdiction no such result could follow, except from foreign legislation over which this State has no control, and for which it is in no way responsible. *The same spirit of legislation is discovered in the Code of 1896*, but from it the exemption clause is omitted, and in the schedule of taxable property there is placed *‘every share of any corporation organized under the laws of this State, of any other State or of the United States (other than railroad, telegraph, express and sleeping car companies, building and loan associations and banks or banking associations) to be assessed and col-*

lected in the county wherein such corporation has its chief or home office in this State, and to be assessed at its actual market value to the person in whose name such shares stand on the books of the corporation and not to the corporation.' Section 3911, Subd. 9. The same section proceeds to prescribe a mode for assessing shares, and also corporate property, and *for deducting the value of the corporation's taxable property from the value of the shares* so as to make the shares taxable only upon excess of values. While the words used in the beginning of this Subdivision 9, standing alone, would seem to include all corporations, the provision taken as a whole would be meaningless and abortive in respect of *foreign corporations having neither property or habitation in this State*, since the fixed plan of assessment could not be pursued either as to place or property. A reasonable interpretation of this whole provision for taxing shares *confines it to shares in corporations having taxable property in this State*. An exemption can be no broader than the class from which it is taken, and this bracketed exception of shares in railroad, telegraph, express and sleeping car companies must be likewise confined to corporations having property subject to taxation here. The exemption of those shares is doubtless for the reason that elsewhere special provisions are made for taxing the property and privileges of the last named corporations, which provisions could have no application to *foreign corporations having no property and doing no business here*. As to shares in them, we find nothing in either code which could be construed as an exemption. By subjecting them,

the State does not infringe its general policy of avoiding double taxation, for the property is not doubly taxed by its own laws, and it is not bound by comity or otherwise to conform to laws elsewhere, in order to shelter property from burdens which but for such foreign laws would not have come upon it. That ownership of shares in capital stock is distinct from ownership of capital stock itself is generally, if not everywhere, recognized. Such shares are property, and as such belong in and are taxable in the State of the owner's residence, irrespective of legislation in another state." (Italics ours.)

State v. Kidd, 125 Ala. 413, 423.

And it was considered as admitted by this Court:

"The exemption by the Code of 1886 of stock in domestic railroads, *and in others that list substantially all their property for taxation* (Sturges v. Carter, 114 U. S. 511, 522, 29 L. Ed. 240, 222, 5 Sup. Ct. Rep. 1014), is not denied, and while it is denied by the defendant in error that there is a similar exemption by the Code of 1896, for the purposes of decision, we shall assume, without examination, that it is granted. State v. Kidd, 125 Ala. 413, 422, 28 So. 418." (Italics ours.)

Kidd v. Alabama, 188 U. S. 730, 47 L. Ed. 669, 672.

The same is true of the case of Wright v. Louisville, etc., Ry. Co., 195 U. S. 219:

"It is admitted that no such double taxation is enforced with regard to corporations of which the property is taxed within the State."

Under the Indiana taxing laws it makes no dif-

ference whether the foreign corporation is taxed in Indiana or not. The schedule requires the owner thereof to list "*all* shares of stock in *any* corporation formed outside of that State." The assessor has no authority to exempt part of the shares so listed on the ground that the foreign corporation pays taxes in Indiana. He must turn the schedule over to the treasurer of the county, in whose hands it becomes, in effect, a warrant commanding him to collect the taxes assessed upon the property listed. The intention to discriminate in order to encourage domestic industries should also be considered in this connection.

We respectfully and earnestly insist that the Supreme Court of Indiana erred in holding that the taxing laws of Indiana did not violate either the commerce clause of or the Fourteenth Amendment to the Constitution.

Respectfully submitted,

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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1912

HENRY Y. DARNELL, Executor, and W. S. DARNELL,
Plaintiffs in Error

vs. No. 78

THE STATE OF INDIANA,
Defendant in Error

Supplemental Brief for Plaintiffs in Error

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

The original brief for the plaintiffs in error was filed many months ago, in order that counsel for defendant in error might have ample time within which to answer, they agreeing that we might later file a supplemental brief. This brief is written and filed in pursuance of that agreement and in the hope and belief that it will be of assistance to the Court in arriving at a decision on the questions presented.

The brief of defendant in error is devoted largely to establishing the fact that the property taxed was at rest; had become a part of the general mass of property in the State, and that it was, therefore, subject to taxation. This we have never denied, and expressly admitted in our original brief. Our proposition is that in taxing it the State of Indiana is not at liberty to discriminate against it because of its foreign origin. The mere fact that property is not actually moving in the channels of interstate commerce, or is not actually being offered for sale at the particular time that it is taxed, does not ex-

cuse a discriminating tax based upon its foreign origin, for even after it is at rest and has acquired a permanent situs, the constitutional protection continues "until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character." This point is fully covered by the cases of *Welton v. Missouri*, 91 U. S. 275, and *Darnell v. Memphis*, 208 U. S. 113. See also *Judson on Interstate Commerce*, Sec. 16.

On pages 41 and 42 of their brief, counsel for defendant in error seem to concede that stock in a corporation is a subject of commerce. They say that stock is "personal property the same as bonds, notes, bill of exchange," and that "they are all subjects of interstate commerce in a certain sense." If stock is personal property "the same as bills of exchange," there can be no question but what it is a subject of commerce, for this Court, in *Nathan v. Louisiana*, 49 U. S. (8 How.) 73, 12 L. Ed. 992, expressly recognized the fact that bills of exchange are as much subjects of commerce as manufactured goods or direct products of the soil. Lottery tickets may be bought and sold and are therefore subjects of commerce. This Court has so held. If that is true of lottery tickets, which represent merely a chance to secure an interest in certain property, it certainly must be true of stock in corporations which represent a present, fixed and vested interest in the corporate property. *Judson on Interstate Commerce*, Sections 9 and 10, lays down the rule that those things are subjects of commerce that are capable of private ownership, and which may be bought, sold or exchanged. This Court has laid

down the same rule, for it has said that that is a subject of commerce—

“in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts and the usages of the commercial world.”

Lyng v. Mich., 135 U. S. 161.

Stock in corporations meets every requirement of this rule.

Upon the proposition that the provisions of the Indiana statutes with reference to the taxation of stock violates the commerce clause of the Constitution, the cases decided by this Court and relied upon by the defendant in error, as justifying the tax, are clearly distinguishable from the instant case. They are all cases in which the foreign property was taxed exactly as the domestic property was taxed, the point on which many of the cases turned being as to whether the property was at rest or not. We will take up separately those cases discussed by the defendant in error upon this point, for the purpose of showing the distinction suggested.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558, is not in point, for the statute required *all* bonds to be listed. If it had taxed foreign bonds and exempted domestic bonds, the question might have been analogous to that presented by the case at bar.

Nathan v. Louisiana, 49 U. S. (8 How.) 73, 12 L. Ed. 992. The act attacked levied an occupation tax upon *all* money and exchange brokers. It read “*each and every* money or exchange broker shall hereafter pay an annual tax.” (Italics ours.) If the act had taxed only such brokers as dealt in foreign bills of exchange there might have been ground

for complaint, although that would not be so clear as in the instant case, for there the tax was not upon bills of exchange, but was upon the person who engaged in the business of an exchange broker. The Court in that case said:

“This is not a tax on bills of exchange. Under the law every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.”

Bonaparte v. Tax Court, 104 U. S. 592, 26 L. Ed. 845. The question here presented was not raised; was not discussed and could not therefore have been decided in that case. The only question there was as to whether the tax violated that provision of the Constitution requiring full faith and credit to be given to the public acts of other States.

Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257. The question was raised in this case, but the tax was held valid because there was no discrimination. The Court said:

“It was taxed in the hands of the owners (or their agents) like all other property in the city. * * * It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax by reason of the coal being imported or brought into Louisiana. * * * It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the city of New Orleans was taxed. * * * *It was subject to no discrimination in favor of goods which were the product of Louisiana.* * * * *It was treated*

in exactly the same manner as such goods were treated." (Italics ours.)

If, like the tax complained of in the instant case, the tax there had been upon coal brought from other States only, exempting coal mined in Louisiana, there can be little question but what the law would have been held void.

Pittsburgh, etc., Coal Co. v. Bates, 156 U. S. 577, 39 L. Ed. 538. The tax in that case was upon *all* coal. The Court said that such provisions of the taxing statutes are valid—

“provided, always, that the assessment does not discriminate between the products of different States.”

There can be no question but what the decision would have been the other way if the statute had required *all* foreign coal to be assessed and exempted domestic coal, as is true of the provision of the Indiana taxing statutes complained of in the instant case with reference to stock in corporations.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538. The tax in this case was not upon anything that was the subject of commerce, but was a merchant's tax applying without discrimination to *all* merchants. If the tax had been only upon merchants handling foreign products, there would be some resemblance between that case and the case at bar.

Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415. There was no discrimination in this case. The stamp tax applied to sales of *all* stock. The cases would have been similar if the tax had been upon the sale of *foreign stock only*.

Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439. No question was raised in this case as to any violation of the Commerce Clause of the Constitution. The case seems to be quoted for the purpose of showing that the stock in the case at bar was not *in transitu* and was taxable. This we have always admitted. Our point is that the tax must not discriminate against foreign stock.

Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, has no bearing on the question presented, and even though it were in point, the tax was not discriminatory. This clearly appears from the opinion of the Court, where it is said:

"The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not."

New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323. In that case the tax was imposed on the business of a Michigan corporation. No tax was imposed directly on foreign articles. The exemption privilege was not confined to New York corporations, but embraced *all* corporations. In the last paragraph of the opinion, the Court clearly indicates that if the exemption privilege had been restricted to New York corporations the act would have been void.

Under the Indiana statute the mere fact that a foreign corporation did all of its business and paid all of its taxes in Indiana would not operate to relieve the owner of its shares from the obligation of listing them for taxation. As Chief Justice Myers of the Indiana Supreme Court says (93 N. E. 995), the language of the provision in the schedule, "all

shares of stock in foreign corporations" leaves "nothing to construction."

The Appellate Court of Indiana, speaking through Judge Roby (40 Ind. App. 598), has said that by virtue of this provision *all* foreign stock must be listed, not for the purpose of determining whether or not it was subject to taxation, but for the purpose of being taxed. Both the Appellate and the Supreme Courts of Indiana are agreed on this proposition, and the language of the provision does not lend itself to any other construction, for it accomplishes all of its results by the same general words, and there is nothing that the Court could base a separation upon in an effort to render the statute constitutional, if that were possible, which we do not admit.

The distinction between those cases and this seems to us clear. The case at bar does not differ, so far as the principle involved is concerned, from *State v. Zophey*, 14 S. Dak. 119, 86 A. S. R. 741, where the Court, in holding a statute void because it discriminated against foreign property, said:

"It will be noticed by the provisions of Section 1 that any person engaged in the manufacture in this State of brewed or malt liquors, who shall have paid the license therefor of four hundred dollars, is not required to pay any wholesale dealer's license, and that under the act he may establish as many warehouses within the State as he may desire, without the payment of any wholesale dealer's license, while a party who manufactures brewed or malt liquors without the State, and desires to establish warehouses and wholesale establishments within the State, is required to pay a license fee of six

hundred dollars in every precinct, town and city in which he establish such warehouse or depository for the sale of such brewed and malt liquors. Thus it will be seen that the law favors the home manufacturer, and imposes a burden upon parties manufacturing without the State not imposed upon home manufacturers. To repeat, the home manufacturer, after paying his manufacturer's license of four hundred dollars, may open warehouses or depositories for wholesale in every precinct, town and city within the State without the payment of any further license fee, while the manufacturers without the State are required to pay a license fee of six hundred dollars in every precinct, town and city within the State in which they may establish a wholesale warehouse or depository. To prevent such discrimination, the Constitution of the United States provides: 'The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' U. S. Const., Art. 1, Sec. 8. One great objection to the operation of the government under the articles of confederation was that it left the several States with the power to impose burdens upon interstate commerce, and to discriminate in favor of their own citizens as against the citizens of other States, and it was this power thus to discriminate, more than any other, that induced the people of the States to abrogate the articles of confederation and establish in their place the present Constitution, in which the power is given to Congress to regulate commerce, not only with foreign nations, but among the several States. In one of the

early cases in which this clause of the Constitution was involved, Mr. Webster, in addressing the Court, said:

‘Over whatever other interests of the country this government may diffuse its benefits and blessings, it will always be true, as a matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object the relief of those necessities, by removing their causes, and establishing a uniform and steady system.’ This section of the Constitution has received as much consideration from the courts as, and perhaps more than, any other one section of that instrument; for the history of the decisions of the Supreme Court of the United States conclusively shows the tendency of the State governments to discrimination in favor of their own citizens as against the citizens of other States. It seems to be well established that any discrimination made by a State in favor of its domestic products, manufactured or grown within the State, as against the products of other States, amounts to a regulation of interstate commerce, whether the State claims to be acting under its police power or under its power of taxation, and is a violation of the clause of the Constitution we are now considering.”

Nothing could so disastrously affect commerce as a construction of the commerce clause that would impair its efficacy. In *Philadelphia, etc., Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, this Court said:

“It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the

State at all, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce or to load it with an intolerable burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things, which actually existed under the confederation, Chief Justice Marshall, in the case before referred to, said:

‘Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.’ *Brown v. Maryland*, 25 U. S., 12 Wheat. 446 (6:688).

Nothing can be added to the force of these words.

Our conclusion is that the imposition of the tax in this cause was a regulation of interstate

and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution."

Those cases relied upon by the defendant in error as showing that there was no violation of the provisions of the Fourteenth Amendment as well as that there was no violation of the commerce clause of the Constitution, are not in point, as in those cases the stock in foreign corporations was not taxed when the foreign corporation conducted its business and paid its taxes in the State, while in Indiana *all* stock in foreign corporations must be listed for taxation.

In *Sturges v. Carter*, 114 U. S. 511, 29 L. Ed. 240, the stock was not taxed when the foreign corporation paid its taxes in Ohio. In that case no question was raised as to any violation of the commerce clause, and it does not clearly appear that any question was raised as to any violation of the Fourteenth Amendment. The case seems to have turned upon the question as to whether the statute was retroactive or not.

The question as to whether such a tax violated the Fourteenth Amendment was first squarely presented in *Kidd v. Alabama*, 188 U. S. 730, 47 L. Ed. 669, but in that case the stock in foreign corporations was also exempt when such corporations did business and paid taxes in Alabama. This appears in the opening paragraph of the Court's opinion, where it is said:

"This is an action for taxes brought by the State of Alabama against the executrix of the will of a citizen of Alabama. It appears on the record that the property in dispute is stock in railroads incorporated in other States than Ala-

Lama, and that the objection was taken seasonably by plea and by requests for instructions to the jury that the tax was unconstitutional under the Fourteenth Amendment, because no similar tax was levied on the stock of domestic railroads *or of foreign railroads doing business in that State.*" (Italics ours.)

This fact is also mentioned in the next paragraph of the opinion and *State v. Kidd*, 125 Ala. 413, is cited to support it. It appears, therefore, that, so far as the violation of the Fourteenth Amendment is concerned, we are not foreclosed by this decision, for the instant case differs very materially in the important fact that in Indiana *all* foreign stock must be listed. It should be noted also that the Court was divided in that case, Justices Harlan and White dissenting. No question was raised in that case as to any violation of the commerce clause.

Wright v. Railroad, 195 U. S. 219, follows the *Kidd* case. No question was made in that case as to any violation of the commerce clause, and it was expressly stated in the opinion that "no such double taxation is enforced with regard to corporations of which the property is taxed within the State."

In *Bacon v. Board*, 126 Mich. 22, the same distinction appears, for foreign stock was not taxed when the foreign corporation paid its taxes in Michigan. The Court said:

"The law taxes both, with the exception of cases where the property of the corporation is taxed in this State."

We would particularly direct the Court's attention to the case of *Stroh v. City of Detroit*, 131 Mich. 109, 90 N. W. 1029, where the Court expressly states

that if their statute had exempted domestic stock and taxed foreign stock when the foreign corporation did business and was taxed in Michigan, it would have been void because discriminatory in that it would thereby subject foreign stock to double taxation.

In our original brief, pages 21 to 25, we clearly show that under the Indiana statute, as construed by its appellate courts, *all* foreign stock must be listed for taxation, and we gather from their brief that this is not disputed by counsel for defendant in error. To what we said there we wish only to add a reference to the Supreme Court's opinion in *Cook v. Board*, handed down on petition for rehearing and found in 93 N. E. 995. In that opinion on the petition for rehearing the Court plants itself squarely upon the proposition that the language of the statute, "all shares of stock in foreign corporations," leaves no room for construction. The Court said (93 N. E. 995):

"As to that matter *the statute fixes the rule of construction*, by expressly declaring as subject to taxation 'all shares of stock in foreign corporations,' *leaving nothing to construction.*" (Italics ours.)

As a logical proposition, the Court could not take any other position, for to do so would have been an act of judicial legislation. We take it for granted that in considering the question presented here this Court will adopt the construction given to the act by the courts of Indiana and, as so construed, determine whether it is constitutional. In any event, no other construction is possible, for the language is

plain and unambiguous and expressly requires the taxation of *all* shares in *any* foreign corporation.

But it is said that the foreign corporation in the case at bar did not do business and was not taxed in Indiana. We do not see how this can affect our position, for it is well settled that where the provision attacked is in general words it must be valid as to all that it embraces or it is altogether void.

“But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void.”

United States v. Ju Toy, 198 U. S. 253, 49 L. Ed. 1040, 1044.

In the Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, the fireman was killed while actually engaged in moving an interstate train. This appears from the opinion where it is said:

“As stated in the declarations as finally amended, recovery was sought in each case of damages occasioned by the death of the respective intestates while serving as a fireman on a locomotive actually engaged in moving an interstate commerce train.”

The scope of the letter of the act in that case is shown by an extract from the Court's opinion, on page 498, reading as follows:

“The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.”

The Court was asked to so construe the act as to confine its operation wholly to interstate commerce, but refused to do so, as there was nothing in the act upon which such a separation could be based, saying:

“The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy.”

The fact that the act would have been valid if limited to the particular circumstances shown in the declaration did not prevent the railroad from taking advantage of the fact that the whole act was void because by general words it also embraced that which Congress had no power to regulate. As was said in *State v. Railroad*, 212 Mo. 658, where the language of the act is general with nothing on its face

whereby to separate "it must stand as a whole as written, or fall as a whole."

The cases of *Pittsburgh, etc., Co. v. Montgomery*, 152 Ind. 1, and *Ballard v. Oil Co.*, 81 Miss. 507, illustrate the distinction that runs through the cases. In the Mississippi case the fellow servant rule was abolished as to "all corporations." In the Indiana case it was abolished as to "every railroad or other corporation, except municipal." In the first case the words were general and the act either valid as to all or altogether void. In the second case the words "every railroad corporation" gave, on the face of the statute, something to separate by, and, as the act was not void altogether, but was valid as to railroad corporations, such railroad corporations could not raise the objection that the act was void so far as certain other corporations were concerned. On page 573 the Supreme Court of Mississippi said:

"The difficulty is in finding the true test as to when a statute may be severed. That test clearly is this: That whenever the Court finds on the face of a statute a number of different provisions, some constitutional and some unconstitutional, there it may sever, if they be not interdependent, between these provisions, striking out the unconstitutional; and, let it be marked, that in every such case there is something to sever between on the face of the statute. That is what is meant by the severance of a statute. But wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the legislature, in order by such interpolation to make the provision which the legislature did put there constitution-

al, this is no case of severance in any proper legal sense; nor is it in any legal or logical sense a proper limitation of the provisions which are in a statute by judicial construction. Such action by a court is nothing less than judicial legislation, pure and simple."

After a critical review of the cases, the Court (pages 578, 579) added:

"In a word, learned counsel will not fail to see, upon a critical examination of all the cases upon the subject, that there never can be any room for the application of the doctrine as to severing a statute, except in those cases where the constitutional provisions, as well as the unconstitutional provisions, both appear on the face of the statute."

In *Baldwin v. Franks*, 120 U. S. 685, 690, 30 L. Ed. 766, this Court said:

"* * * Reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. * * * The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

And in *Railroad v. McKendree*, 203 U. S. 514, 51 L. Ed. 298, it was said:

"Nor have we the power to so limit the secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the

face of the order, the secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible. In *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563, 565, upon this subject, this Court said:

‘We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.’

And the Court declined to make such limitation.”

The same rule is recognized by the Supreme Court of Indiana:

“To authorize the courts to reject part and sustain part of a statute, ‘the two parts must be capable of separation, so that each can be read by itself. Limitation by construction is not separation.’ *Baldwin v. Franks*, 120 U. S. 678 (30 L. Ed. 766); *Virginia Coupon Cases*,

114 U. S. 269 (29 L. Ed. 185); Trade-Mark Cases, 100 U. S. 82 (25 L. Ed. 550); United States v. Reese, 92 U. S. 214 (23 L. Ed. 563)."

State ex rel Corwin v. Indiana Co., 120 Ind. 575.

"We understand it to be firmly established that where a separation cannot be made, and the invalid provision completely detached and treated as independent, the whole act must be pronounced void."

Griffin v. State ex rel Griffiths, 119 Ind. 520.

For other cases holding that, where the language of the act is general and there is nothing on the face of the act by which a separation may be effected, the act must be valid as to all it embraces or altogether void, see:

Logan v. Stogdale, 123 Ind. 372.

State v. Railroad, 136 Wis. 407.

Poindexter v. Greenhow, 114 U. S. 270, 29 L. Ed. 185, 197.

United States v. Reese, 92 U. S. 214, 23 L. Ed. 566.

United States v. Steffens, 100 U. S. 82, 25 L. Ed. 550.

Sprague v. Thompson, 118 U. S. 90, 94, 30 L. Ed. 115, 116.

Some of the cases cited and quoted by us on this proposition are civil and others criminal. The rule is the same in both.

And where exceptions in an act result in discrimination the whole law is void.

"The section of the Georgia Code, above quoted, does contain such discriminations as are prohibited by Section 4237, R. S. It excepts from its operation 'coasters in this State,' and 'between the ports of this State and those of South Carolina,' and 'between the ports of this State and those of Florida.'

It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal ex-

ceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Section 4237 of the Revised Statutes."

Sprague v. Thompson, 118 U. S. 90, 30 L. Ed. 117.

It follows that if the provision of the Indiana tax law complained of in the case at bar is not valid when applied to stock in a foreign corporation which is located in Indiana and pays all of its taxes there, it is void altogether. That it does embrace such stock is clear from the construction placed upon it by the Supreme Court of Indiana, or rather their decision that the words are general, are unambiguous and leave nothing for construction.

We earnestly and respectfully insist that the provision of the Indiana taxing statutes complained of violates both the commerce clause of and the Fourteenth Amendment to the Constitution.

Respectfully submitted,

MERRILL MOORES,

JOSEPH F. COWERN,

Attorneys for Plaintiffs in Error.

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Office Supreme Court, U. S.
FILED.

DEC 26 1911

JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

HENRY V. DARNELL, EXECUTOR OF
THE ESTATE OF ISAAC M. DARNELL,
DECEASED, AND WALTER S. DARN-
ELL, *Plaintiffs in Error,*

v.

THE STATE OF INDIANA,
Defendant in Error.

No. 78.

In Error to the Supreme Court of the State of Indiana.

BRIEF FOR DEFENDANT IN ERROR.

THOMAS M. HONAN,

Attorney-General of Indiana.

JAMES R. McCULLOUGH,

EDWARD B. RAUB,

MARTIN M. HUGG,

Attorneys for Defendant in Error.

File No. 22,277.

IN THE
Supreme Court of the United States

HENRY Y. DARNELL, EXECUTOR OF
THE ESTATE OF ISAAC M. DARNELL,
DECEASED, AND WALTER S. DARNELL, *Plaintiffs in Error*,

v.

THE STATE OF INDIANA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was brought by the State of Indiana against Isaac M. Darnell, since deceased, and Walter S. Darnell, to recover of them taxes upon shares of the capital stock in the I. M. Darnell & Son Company, a corporation incorporated under the laws of the State of Tennessee and located at Memphis, in that State, owned by said Isaac M. Darnell, a resident of the city of Indianapolis, in Marion County, Indiana. These shares of stock had not been returned for taxation by said Isaac M. Darnell for the years 1900, 1901, 1902, 1903, 1904, 1905, 1906 and 1907, as required by the laws of the State of Indiana. Proceedings were had before the auditor of Marion County, which resulted in said Isaac M. Darnell being assessed for the sum of \$10,578.59 upon said shares of stock, on the ground that the same had

been omitted to be returned and assessed for taxation for said years, and said amount was thereupon placed and extended upon the tax duplicates of said county. The said taxes not being paid, the State of Indiana filed its complaint in the Circuit Court of Marion County to recover of said Isaac M. Darnell the amount of said taxes and to set aside a conveyance of certain real estate in the city of Indianapolis made by said Isaac M. Darnell to his co-defendant, Walter S. Darnell, as being fraudulent, and to subject said real estate to the payment of said taxes assessed against said Isaac M. Darnell. The complaint sets out in detail the various steps taken in making the assessment. (Trans., p. 1 to p. 9, incl.)

Afterwards the State filed its second paragraph of complaint, asserting that after notice had been given to said Isaac M. Darnell of the claim of Marion County and the different taxing bodies thereof for the taxes upon said stocks omitted to be returned for taxation, the said real estate in the city of Indianapolis was fraudulently conveyed by said Isaac M. Darnell to said Walter S. Darnell to defeat the collection of the taxes owing upon said stocks so omitted to be returned; that said real estate was subject to the lien of the State of Indiana for the payment of said taxes in full; that the lien accrued each year from 1900 to 1907, and when said lien accrued it became a lien upon said real estate and could not be divested by any sale or transfer of said real estate. And the State prayed that said real estate be decreed to be held in trust by the plaintiff in error, Walter S. Darnell, and that the lien of the State be foreclosed against said real estate and that the same be sold to pay and

satisfy the claim of the defendant in error, and also prayed that said conveyance be declared fraudulent and void and said real estate be subjected to the payment of said taxes and that the lien thereof be declared paramount. (Trans., p. 21 to p. 23, incl.)

Service was had by publication. (Trans., p. 17 to p. 19, incl.)

The said Isaac M. Darnell and the plaintiff in error, Walter S. Darnell, entered their special appearance. (Trans., pp. 19 and 20.)

A plea in abatement was filed. (Trans., p. 24 to p. 26, incl.)

To this plea the defendant in error demurred and the court sustained the same. (Trans., pp. 27 and 28.)

Thereupon a petition was filed for removal to the United States Circuit Court for the District of Indiana and bond tendered. (Trans., p. 28 to p. 31, incl.)

Defendant in error filed its motion to reject said petition and this motion was sustained. (Trans., pp. 31 and 32.)

The said Isaac M. Darnell and the plaintiff in error, Walter S. Darnell, filed their demurrer to the complaint for want of jurisdiction of the persons of said defendants or of the subject-matter of the action and that it did not state facts sufficient to constitute a cause of action against them or either of them. The demurrer alleged that the statute of the State of Indiana, providing for the taxation of shares of stock in a foreign corporation owned by inhabitants of the State of Indiana, was in violation of Article 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of Section 8, Article 1 of the Constitution of the United States. (Trans., pp. 32 and 34.)

The demurrer was overruled and excepted to. (Trans., p. 34.)

The defendants below refused to plead further and judgment was thereupon rendered on the demurrer. The court rendered judgment against said Isaac M. Darnell in favor of the defendant in error for \$12,271 and the costs of the action, and decreed that the conveyance from said Isaac M. Darnell to the plaintiff in error, Walter S. Darnell, was fraudulent and void, and the court set aside said conveyance and ordered said real estate sold to satisfy said judgment. (Trans., pp. 34 and 35.)

The defendants below then moved to set aside the said judgment, for the reasons that the court below had no jurisdiction of the subject-matter or of the persons of said defendants and that the statute under which the proceedings were had was in violation of Sections 8 and 9 of Article 1 of the Constitution of the United States, and also that the judgment was in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives them and each of them of their property without due process of law, they having been served by publication only and having never entered a general appearance. (Trans., pp. 35 and 36.)

The court overruled this motion. (Trans., p. 36.)

Then the defendants below moved to modify the judgment by striking out so much as rendered a personal judgment against said Isaac M. Darnell, for the reason that it was in violation of the Fourteenth Amendment and deprives said defendant of his property without due process of law and denied him the equal protection of the law, he having been served by publication and not having appeared voluntarily or having entered a general appearance. (Trans., p. 36.)

This motion was also overruled. (Trans., p. 37.)

The said Isaac M. Darnell and the plaintiff in error, Walter S. Darnell, then appealed to the Supreme Court of Indiana. (Trans., p. 37.)

The Supreme Court of Indiana affirmed the action of the trial court. (Trans., p. 41 to p. 49, incl.)

This action of the Supreme Court of Indiana is sought to be reviewed here by writ of error.

The assignment of error in this court challenges the ruling of the Supreme Court of Indiana in holding that the statutes of the State of Indiana authorizing taxation of shares of stock in a foreign corporation owned by a resident of Indiana did not contravene Section 8, Article 1, of the Constitution of the United States, and did not conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States.

1. That the statutes of Indiana authorizing the taxation of shares of stock in a foreign corporation owned by an inhabitant of Indiana are void, because they violate the interstate commerce clause of the Constitution of the United States.

2. That said statutes violate the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States, "Nor deny to any person within its jurisdiction the equal protection of the laws." (Trans., pp. 55 and 56.)

After the submission of the appeal to the Supreme Court of Indiana the defendant below, Isaac M. Darnell, died and the Henry Y. Darnell, executor of his last will and testament, was substituted as a plaintiff. (Trans., p. 49.)

These are the only propositions discussed in the brief of counsel for the plaintiffs in error, and we assume that all other questions raised in the Su-

preme Court of Indiana are viewed as not presenting federal questions.

The following provisions of the Constitution of Indiana and of the statutes of the State are pertinent to the case at bar. The references are to Burns' Revised Statutes of 1908.

Section 1, Article 10, of the Constitution of Indiana. (Section 193, 1 Burns' R. S. 1908.)

"The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

Sec. 10142. "All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Sec. 10160. "All personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant on the first day of March of the year for which the assessment is made, with the following exceptions:

1. All goods and chattels situated in some township, town or city other than where the owner resides, shall be assessed in the township, town or city where situated, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, dock yard, piling ground, place for sale of property, ship, office, mine, farm, place of storage, manufactory or warehouse thereon, for use in connection with such goods and chattels: Provided, that the procuring any such property to be manufactured upon contract shall be deemed the hiring of a mill or manufactory, within the meaning of this section.

2. All animals kept throughout the year in some township, town or city, other than where the owner resides, shall be assessed to such owner, or to the

person in possession in the township, town or city where kept.

3. All shares in banks shall be assessed to their owners in the city or town where the bank is located.

4. Personal property of non-residents of the state shall be assessed to the owner or to the person having control thereof in the township, town or city where the same may be, except that where such property is in transit to some place within the state it shall be assessed in such place.

5. The personal property of minors under guardian shall be assessed to the guardian in the township, town or city where the guardian resides, but shall not be assessed or taxed for city or town purposes unless the ward resides in such city or town, and the personal property of every other person under guardianship shall be assessed to the guardian in the township, town or city where the ward resides.

6. The personal property of the estates of deceased persons in the hands of executors, administrators or other persons shall be assessed to the persons in charge of such property in the township, town or city where the deceased last dwelt, until such property has been distributed to the heirs or other persons entitled thereto. If such decedent was a non-resident of the state, such property shall be assessed in the township, town or city where situated.

7. Personal property under the control of a trustee or agent, whether a corporation or natural person, may be assessed to such trustee or agent except as otherwise by law provided in the township, town or city in which such trustee or agent resides.

8. All personal property of any person situate upon, also all buildings situate and being upon the land of the United States, or of this state, or upon the lands of any county, township, town or city, shall be deemed personal property for purposes of taxation and assessment, and shall be assessed as personal property to the owner or occupant thereof in the township, town or city to which said lands be-

long or of which they form a part, and such buildings shall be subject to sale for taxes in the same manner as herein provided for personal property: Provided, however, it shall not be necessary to remove such buildings for the purpose of sale.

9. Personal property of non-residents of the state in the possession or under the control of any person or corporation as trustee, receiver, executor, administrator or guardian shall be assessed for state and county purposes only and in the county where the court is situated by which such trustee, receiver, executor, administrator or guardian was appointed or to which such trustee, receiver, executor, administrator or guardian reports.

10. Personal property in the possession of any person or corporation as trustee, receiver, executor, administrator or guardian shall be assessed for state and county purposes in the county where the court is situated by which said trustee, receiver, executor, administrator or guardian was appointed, or to which such trustee, receiver, executor, administrator or guardian reports."

Sec. 10161. "All corporate property, including capital stock and franchises, except where some other provision is made by law, shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this state is situated shall be deemed its residence, but if there be no principal office in the state, then such property shall be listed and taxed at any place in the state where the corporation transacts business."

Sec. 10199. "Every person required by this act to make or deliver such statement or schedule shall set forth an account of the property held or owned by him as follows:

PERSONAL PROPERTY—CREDITS.

1. All annuities and royalties.
2. All bonds, notes, mortgages, accounts, demands, claims and other indebtedness owing to such person, whether such indebtedness is owing from in-

dividuals or from corporations, public or private, and whether such debtors reside within or without the state.

3. All bona fide indebtedness owing by such person which shall be held to mean notes and accounts only.

PERSONAL PROPERTY—CHATELS.

1. All shares in banks organized in this state under any law of this state, or of the United States, and their full market value, after deducting the value of the real estate as taxed to the banks.

2. All shares in foreign corporations, other than banks, and their value.

3. All shares in other corporations, organized under the laws of this state, when the property of such corporation is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares.

4. All moneys, including circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency, and gold, silver and other coin.

5. The value of all gold and silver plate, watches, diamonds and jewelry.

6. The value of all household furniture and musical instruments.

7. All patent rights, describing them, and giving the number of each patent, and the value of each.

8. The number and kinds of domestic animals and their value.

9. All wagons, carriages and sleighs and their value.

10. All mechanical and agricultural implements and tools, and their value.

11. All machinery not affixed to real property, and its value.

12. All ships, boats and vessels, whether at home or abroad, and their value.

13. All merchandise and stock in trade, and its value.

14. All logs, timber, lumber, posts, ties, cord wood, staves or other felled or cut timber, and their value.

15. All other goods, chattels and personal property, not heretofore specially mentioned, and their value, except property specifically exempt from taxation."

Sec. 10202. "Before the first day of March of each year the county auditor shall have in readiness for delivery to the assessor the proper assessment books and necessary blanks for the assessment of all property, real and personal. The schedule, with affidavits thereto attached to be signed by the party, shall be in the following form, the names and places being changed to suit each person: The words 'value,' 'cash value,' 'true value,' or 'valuation,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which such term or terms are applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at force or auction sale. The party shall write the word 'none' after each item, whenever he has no property to assess as named on such item, and no item shall be passed without being answered.

Schedule of all property held by
..... of Township,
..... County, Indiana, on the first
day of March, 1902."

Number.	PERSONAL PROPERTY — CHATTELS.	Valuation by Party.	Valuation by Town- ship As- sessor.	Valuation by County Assessor.
	00	00	00
<p>"8. All shares of stock in any corporation formed outside of this State; and also all shares of stock in any corporation formed in this State and conducting its business outside of this State."</p>				

Sec. 10233. "Every street railroad, water works, gas, manufacturing, mining, gravel road, plank road, saving bank, insurance and other associations incorporated under the laws of this state (other than railroad companies and those heretofore specifically designated) shall, by its president or other proper accounting officer, between the first day of March and the fifteenth day of May of the current year, in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company or association.

2. The amount of capital stock authorized, and the number of shares in which such capital stock is divided.

3. The amount of capital stock paid up.

4. The market value, or if no market value, then the actual value of the shares of stock.

5. The total amount of indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase of improvement of property.

6. The value of all tangible property.

7. The difference in value between all tangible property and the capital stock.

8. The name and value of each franchise or privilege owned or enjoyed by such corporation.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of state. In case of the failure or refusal to make report, such corporations shall forfeit and pay one hundred dollars for each additional day such report is delayed beyond the fifteenth day of May, to be sued and recovered in any proper form of action in the name of the state of Indiana, on the relation of the prosecuting attorney, such penalty, when collected, to be paid into the county treasury, and such prosecuting attorney in every case of conviction shall be allowed a docket fee of ten dollars to be taxed as costs in such action."

Sec. 10343. "The lien of the state for all taxes for state, county, school, road or township purposes, shall attach on all real estate, on the first day of March annually, and such lien shall be perpetual for all taxes due from the owner thereof, which have heretofore accrued or shall hereafter accrue, with the interest and penalties in each case until payment; which lien shall in no wise be affected or destroyed by any sale or transfer of any such real estate."

Sec. 10344. "All the property, both real and personal, situated in any county, shall be liable for the payment of all taxes, penalties, interest and costs charged to the owner thereof in such county, and no partial payment of any such taxes, penalties, interest or costs shall discharge or release any part or portion of such property until the whole is paid; which lien shall in nowise be affected or destroyed by any sale or transfer of any such personal property, and shall attach on the first day of March, annually, for the taxes of such year."

Sec. 10310. "Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, from any cause, been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon; to enable him to do which he is invested with all the powers of assessors under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it, or in possession thereof resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him at his office a specified time, within five days after giving such notice and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so no-

tified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor shall, in all cases file in his office a statement of the facts or evidence on which he made such correction; but, he shall in no case reduce the amount returned by the assessor without the written consent of the auditor of state, given on the statement of facts submitted by the county auditor. When the county auditor shall discover credible information or have reason to believe that the real or personal property has, from any cause been omitted, in whole or in part, from assessment for taxation, or such credible information shall be furnished to such county auditor it shall be the duty of such county auditor to take the steps provided for by this section, to place such omitted property on the tax duplicate. If such county auditor shall fail or refuse, on the discovery by himself, or on credible information being furnished him by another person, that property has been omitted from taxation, the state on the relation of any state officer, or of the state board of tax commissioners, or of any taxpayer of the county in which such failure or refusal occurs, shall have the right to proceed against such county auditor in any court of competent jurisdiction by mandamus, to compel such county auditor to comply with the provisions of this section. In the trial of such a suit, the question of what constitutes credible information, as mentioned in this act, shall be a question of fact to be determined by the court or jury trying the case, and either party shall have the right to demand a jury to try such question of fact. If judgment shall be rendered to the effect that credible information has been discovered by, or furnished to such county auditor, or that he has reason to believe that property has been omitted from taxation, it shall then be the duty of such county auditor to forthwith place such omitted property on the tax duplicate in accordance with the provisions of this act, and such county auditor shall be liable for all costs of such mandamus suit and for a

reasonable attorney's fee for the relator's attorney which shall be taxed as a part of the costs of such suit in all cases, where judgment is rendered against him: Provided, however, that in case proceedings are instituted hereunder on the relation of any private citizen, such relator shall give bond to the satisfaction of the court to pay all costs which may be recovered against them."

POINTS AND AUTHORITIES.

The taxing statutes of Indiana taxing shares of stock in a foreign corporation held by a resident of Indiana do not violate the interstate commerce clause of the Constitution.

1. A State has jurisdiction of all persons and things which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in use by the United States, and such State may tax, as part of their general estate attached to their persons, its residents for personal property owned by them but situated within another State, even though the latter State also taxes such property.

Coe v. Errol, 116 U. S. 517-524;

See also *Bonaparte v. Tax Court*, 104 U. S. 592.

2. "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children."

Union Transit Co. v. Kentucky, 199 U. S. 194-202.

3. In cases of intangible personal property the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that such property may be taxed at the domicile of the owner as the real *situs* of the property.

Union Transit Co. v. Kentucky, 199 U. S. 194-205.

4. A tax in the State of Tennessee is no tax in the State of Indiana.

Wright v. Louisville and Nashville R. R. Co., 195 U. S. 219-222;

Kidd v. Alabama, 188 U. S. 730-733.

5. "In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders," Chief Justice Waite in *Tennessee v. Whitworth*, 117 U. S. 129-136;

New Orleans v. Houston, 119 U. S. 265-277;

Bank of Commerce v. Tennessee, 161 U. S. 134-146;

Owensboro National Bank v. Owensboro, 173 U. S. 644-682.

6. The capital stock of a corporation is separable from the property of the corporation and the stockholders may be taxed upon their stock as for any other property they may own.

Gordon v. Appeal Tax Court, 3 How. (U. S.) 133-150;

Sturges v. Carter, 114 U. S. 511-521.

7. "The capital stock is another property—corporate associated, for the purpose of banking—but in its parts is the individual property of the stockholders in the proportions they may own them. Being their individual property, they may be taxed for it, as they may for any other property they may own."

Gordon v. Appeal Tax Court, 3 How. (U. S.) 133-150.

8. Shares of stock in a corporation follow the domicile of the owner like other personal property.

1 Cooley on Taxation (3d ed.) 86;
 2 Cook on Corporations, Sec. 565;
Sau Francisco v. Fry, 67 Cal. 470;
Hart v. Smith, 159 Ind. 182-193;
Greenleaf v. Board, 184 Ill. 226-228;
See Kirtland v. Hotchkiss, 100 U. S. 491-499.

9. Bonds secured by mortgage held by a non-resident of the State in which the mortgaged property is situate are personal property and follow the domicile of the owners.

State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300-323.

10. A tax on the property of a corporation is not a tax upon its capital stock.

Van Allen v. The Assessors, 3 Wall. 573-583.

11. The owner of shares of stock in a corporation may dispose of them at his pleasure and in so doing works no change or modification in the title of the corporate property; upon his death such shares go to his administrator, although the entire capital of the corporation may consist of real estate, and will be distributed according to the law of a domicile of the owner and not the law of the domicile of the corporation.

Judy v. Beckwith (Iowa), 114 N. W. Rep. 565-567;
Bradley v. Bauder, 36 Ohio St. 28.

12. The taxation by one State of shares of stock in a corporation of another State owned by a resident of the former State is a matter of policy for

the legislature to determine in the absence of constitutional prohibition.

Kirtland v. Hotchkiss, 100 U. S. 491-499;
Bacon v. Board, etc., 126 Mich. 22-26;
Greenleaf v. Board, 184 Ill. 226-227.

13. Indiana taxed the shares because they were owned by one of its residents and within its jurisdiction, not because they were employed in interstate commerce.

See *Pullman's Car Co. v. Pennsylvania*,
 141 U. S. 18-25.

14. The tax upon the shares of Isaac M. Darnell was not a tax on, or because of, the transportation, or the right of transit of said shares to the State or through the State to other States or countries.

See *Pullman's Car Co. v. Pennsylvania*,
 141 U. S. 18-25.

15. Isaac M. Darnell was not engaged in commerce between the States; his shares of stock were not in transit between or through any of the States; he had not gone into Indiana to sell his shares; and therefore the shares were not interstate commerce.

Hatch v. Reardon, 204 U. S. 152.

16. Indiana did not impose the tax upon the shares owned by Isaac M. Darnell as imported articles or on their sale.

New York State v. Roberts, 171 U. S.
 658-664.

17. Deposits and debts in one State owing to a resident of another State which are delayed within the jurisdiction of the former State an indefinite

time are not *in transitu* so as to withdraw them from the taxing power of such State.

Blackstone v. Miller, 188 U. S. 189-203.

18. After an article has ceased to be an import from another State by being mingled with other property in the State into which it was sent, it is subject to taxation by the latter State.

Nathan v. Louisiana, 8 How. 73-80.

19. Whenever property has become incorporated into the bulk of the property of a State it is subject to taxation by such State.

Pittsburg, etc., Coal Co. v. Bates, 156 U. S. 577-589;

Brown v. Houston, 114 U. S. 622-633.

20. It is not a violation of the interstate commerce clause of the Constitution for a State to tax her resident citizens for debts held by them against non-residents.

Kirtland v. Hotchkiss, 100 U. S. 491-499.

21. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine when the article or product passes from the control of the State and belongs to commerce.

United States v. E. C. Knight Co., 156 U. S. 1-13.

22. Where goods shipped from one State into another had arrived at their destination and were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed with-

out discrimination like all other property, this tax did not amount to a regulation of interstate commerce in the sense of the Constitution, although the levy of such tax might remotely or indirectly affect interstate commerce.

American Steel and Wire Co. v. Speed,
192 U. S. 500-521.

The taxing statutes of Indiana did not deny to Isaac M. Darnell the equal protection of its laws in controvention of the Fourteenth Amendment to the Constitution.

1. "The rule of equality, in respect to the subject, only required the same means to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Kentucky Railroad Tax cases, 115 U. S.
321-337;

Home Insurance Co. v. New York, 134 U.
S. 594-606;

Southwestern Oil Co. v. Texas, 217 U. S.
114-126.

2. "The Fourteenth Amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

Home Insurance Co. v. New York, 134 U.
S. 594-606;

Southwestern Oil Co. v. Texas, 217 U. S.
114-123.

3. Under a law of New York imposing a transfer tax upon personal property within the State belong-

ing to a non-resident at the time of his death, such transfer tax may be levied upon debts and deposits owing to such decedent by citizens of New York, and such transfer tax does not deprive the executrix and legatees of such decedent of any of the privileges and immunities of the citizens of New York.

Blackstone v. Miller, 188 U. S. 189-207.

4. The taxation by one State of shares of stock owned by a resident in a corporation of another State, when the property of the corporation is taxed in the State in which it is incorporated and does business, is not double taxation.

Sturges v. Carter, 114 U. S. 511-521;
New Orleans v. Houston, 119 U. S. 265-277; 63 Cal. 470-471;
Porter v. Rockford, etc., R. Co., 76 Ill. 561-566;
Greenleaf v. Board, 184 Ill. 226-227;
Thrall v. Guiney, 141 Mich. 392-396;
Judy v. Beckwith, 114 N. W. Rep. 565-568.

5. To be double taxation the same State must tax the corporation for its property and also tax its shares in the hands of the owners.

Thrall v. Guiney, 141 Mich. 392-396;
Judy v. Beckwith, 114 N. W. Rep. 565-568;
Bradley v. Bauder, 36 Ohio St. 28-35.

6. A tax may lawfully be levied on the shares of a foreign corporation held and owned by a resident of the State which imposes the tax.

Kidd v. Alabama, 188 U. S. 730;
Cooley on Taxation (3d ed.), 86;
Bradley v. Bauder, 36 Ohio St. 28;
Bacon v. Board, 126 Mich. 22;
San Francisco v. Fry, 63 Cal. 470;

Greenleaf v. Board, 184 Ill. 226-228;
Stanford v. San Francisco, 131 Cal. 34;
Newark City Bank v. The Assessor, 30 N.
 J. L. 13-20;
Sturges v. Carter, 114 U. S. 511;
Wright v. Louisville and Nashville R. R.
Co., 195 U. S. 219;
Kirtland v. Hotchkiss, 100 U. S. 491-499;
Thrall v. Guiney, 141 Mich. 392-397;
Commonwealth v. Lowell, 101 S. W. Rep.
 (Ky.) 970;
Judy v. Beckwith, 114 N. W. Rep. (Iowa)
 565.

7. Whether the State of Indiana shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere.

Kirtland v. Hotchkiss, 100 U. S. 491-499;
Liverpool, etc., Ins. Co. v. Orleans Assessors, 221 U. S. 346-356.

8. The taxation of shares of stock in a foreign corporation by the State in which the owner resides is not a violation of the Fourteenth Amendment to the Federal Constitution.

Kirtland v. Hotchkiss, 100 U. S. 491-499;
Thrall v. Guiney, 141 Mich. 392.

ARGUMENT.

THE INDIANA STATUTES DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION.

The assessment which is attacked in this case was made on the 21st day of June, 1907, against Isaac M. Darnell for stocks owned by him in the I. M. Darnell & Son Company for the years 1900, 1901, 1902, 1903, 1904, 1905, 1906 and 1907. The stocks were appraised at \$89,300.00 for the years 1900, 1901 and 1902 and for \$49,300.00 for the other years. The said Isaac M. Darnell & Son Company was a corporation incorporated under the laws of the State of Tennessee and located at Memphis in said State. (Trans., p. 3 to p. 6, incl.) The complaint alleged that said Isaac M. Darnell was a resident of the city of Indianapolis, in Marion County and State of Indiana, during all the years for which said assessment was made, and that "he received, accepted and enjoyed all of the benefits and immunities accruing to him as a resident of said city," and maintained his domicile in said city continuously during each of the said years. (Trans., p. 2.) The said assessment was made pursuant to the laws in the State of Indiana as property omitted and sequestered from taxation. The complaint further alleged that said Isaac M. Darnell, with the fraudulent intent and purpose to evade the payment of taxes upon said shares of stock, conveyed certain real estate in the city of Indianapolis to the plaintiff in error, Walter S. Darnell. After an unsuccessful effort to plead in abatement, the defendants below demurred to the complaint. (Trans., pp. 32 and 33.) This demurrer was overruled. (Trans., p. 34.) The defendants below refusing to plead fur-

erty, and the commerce clause of the Constitution can be invoked only to protect such property against unjust discrimination. *Wilton v. Missouri*, 91 U. S. 275; *Sturgis v. Carter*, 114 U. S. 511; *Brown v. Houston*, 114 U. S. 622; *Pittsburgh, etc., Coal Co. v. Bates*, 156 U. S. 577; *Kidd v. Alabama*, 188 U. S. 730; *American, etc., Co. v. Speed*, 192 U. S. 538; *Wright v. Louisville, etc., R. Co.*, 195 U. S. 219.

Appellants cite in support of their contention the case of *Darnell & Son v. Memphis*, 208 U. S. 113. The court in that decision again declared that property which has moved in the channels of interstate commerce after it is at rest in a State and has become commingled with the mass of property therein, may be taxed by such state without thereby imposing a direct burden upon interstate commerce, provided there is no discrimination against such property whereby a burden of taxation is imposed on it greater than that levied upon domestic property of like nature. The conclusion was that the disputed tax involved in that case was a direct burden upon interstate commerce for the reason that the law of Tennessee was discriminatory and imposed a tax upon logs and lumber which were the products of the soil of other states when brought into that state, and in express terms exempted like property produced from the soil of Tennessee.

It is further argued that the tax law of Indiana in question violates section one of the Fourteenth amendment to the Constitution of the United States, for the reason that it denies appellant Isaac M. Darnell equal privileges and immunities with other citizens, and denies him the equal protection of the laws. It is conceded that property cannot be singled out and subjected to discriminative burdens, at any time, because of its foreign origin, but the owner of such property, in its use and enjoyment, is entitled to the equal protection of the laws.

The fallacy in appellants' contention throughout is in the erroneous assumption that the tax law of this state either makes or permits any discrimination against the holder in this state of shares of stock

in a foreign corporation. All property, both real and personal, within this state is subject to taxation, except only such as the constitution authorizes to be exempt, because it is devoted to municipal, educational, literary, scientific, religious or charitable purposes. The intent manifest in our tax law is to require all property to contribute *pro rata* its share of taxes, and so far as practicable to avoid double taxation. Domestic corporations are taxed upon all their property: their tangible property is first listed and assessed in the same manner as like property owned by natural persons, and in addition the corporation is required to furnish a statement showing the value of any franchise or other right owned or enjoyed by it, and the market value of its capital stock, and if in any case the value of the capital stock exceeds that of the tangible property, such excess is also assessed to the corporation. The state, in its discretion, might tax the shares of stock in such corporation to the individual owners thereof residing in this state, but it would in a sense be double taxation and it has not been the policy of this state to do so. Shares of stock in a foreign corporation doing business in another state owned and held by a resident of this state are taxed because they have not been and cannot be otherwise taxed by this state. If a corporation organized in this state is engaged in business in another state, and all its tangible property is outside this state, then its shares of stock owned by residents within this state are taxable in the same manner as stock in a foreign corporation. The fact that the state in which the corporate property may be situated taxes such tangible property in no wise affects the right of this state to tax its own inhabitants upon all their personal property including shares of stock in such foreign corporation. The man who resides in one state and enjoys the benefit of its schools, churches, society, highways and other public accommodations, as well as its governmental protection over his person and property, is in no position to complain when required to contribute by taxation ratably upon his

property for the maintenance of these institutions and the local government. It is clear to our minds that the tax law of Indiana is not open to the charge of discrimination against stock in foreign corporations, but imposes only just and equal burdens upon all corporate stocks without regard to the place of incorporating or of conducting the corporate business, and does not violate either the third clause of section 8, Art. 1, or the Fourteenth Amendment to the Constitution of the United States, and is accordingly valid. *Wright v. Louisville, etc., R. Co.*, 195 U. S. 219; *Kidd v. Alabama*, 168 U. S. 730; *Georgia Railroad v. Wright*, 124 Ga. 596; *Georgia Railroad v. Wright*, 125 Ga. 589; *Greene County v. Wright*, 126 Ga. 508; *Ogden v. City of St. Joseph*, 90 Mo. 522; *Bacon v. Board*, 122 Mich. 22, 86 Am. St. 524, 60 L. R. A. 321; *Whitaker v. Brooks*, 90 Ky. 681; *San Francisco v. Fry*, 63 Cal. 470; *Greenleaf v. Board*, 184 Ill. 226, 75 Am. St. 168; *Dyer v. Osborne*, 11 R. I. 321, Am. Dec. 460."

We believe that the Supreme Court of Indiana was right and that its reasons are sustained by the authorities. It is for the Legislatures to enact statutes and for the courts to construe them, and the courts will not look into the motives or policy of the Legislature in determining the constitutionality of legislation. These principles are too well settled to require any citation of authorities.

Counsel for plaintiffs in error place great reliance upon the case of *Darnell & Son v. Memphis*, 208 U. S. 113. In this case the city of Memphis had taxed logs cut from the said States other than Tennessee and which had been brought into Tennessee from other States, and which were held by the plaintiff in error as the immediate purchaser or vendee awaiting manufacture into lumber, and also lumber manufactured by the plaintiff in error from logs brought into Tennessee from other States and which

was lying in its yards awaiting sale. The constitutions and laws of Tennessee exempted from taxation the direct product of the sale of that State in the hands of the producer and his immediate vendee and articles manufactured from the produce of the State in the hands of the manufacturer. Logs cut from the State of Tennessee as well as lumber manufactured from such logs were exempt under these provisions. It was held that this tax was a direct burden upon interstate commerce. The logs brought into the State of Tennessee were to be there manufactured into lumber and sold. They were clearly interstate commerce. In the case at bar there is no showing that the stock was interstate commerce, or even that it was for sale or had been offered for sale. It was no more interstate commerce than bonds, notes, bills of exchange and accounts held by a citizen of one State against a citizen of another State. In *Darnell & Son v. Memphis*, *supra*, the cases of *Sturges v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; and *Wright v. Louisville & Nashville R. R. Co.*, 195 U. S. 219, involving the taxation by one State of stocks in a corporation of another State owned by the residents of the taxing State, were not cited or discussed. The case of *Darnell & Son v. Memphis*, *supra*, is not in conflict with these cases. The taxes assessed and paid by the corporation are in no sense a tax assessed against and paid by the holder of shares of stock in the corporation, when he is a nonresident of the State in which the corporation is incorporated. As a rule domestic corporations in Indiana pay taxes on the property or capital stock of the corporation and the stockholders are relieved from paying taxes on their shares in Indiana. But when a resident of Indiana is the owner of shares of stock in a foreign

corporation the corporation pays nothing to the State. The stock owned by the resident of Indiana is entirely separate and distinct from the property, franchises and capital stock of the corporation. It is intangible personal property situate in the State of Indiana. If the owner of such stock should be relieved from taxation in Indiana, it would be a discrimination against the owners of other personal property in the State. The latter would be assessed and required to pay taxes upon their personal property, and the holder of stock in a foreign corporation, no matter how large his investment, would pay nothing, though the *situs* of his stock would be in Indiana.

The property, capital stock, and franchises of the I. M. Darnell & Son Company were not situate or taxed in Indiana. The shares of stock owned by residents in an Indiana corporation engaged in business in another State and having all its tangible property outside of the State of Indiana, is taxed in the same manner as stock held by a resident of Indiana in a corporation incorporated under the laws of another State. The Supreme Court of Indiana in the case at bar said upon this subject:

"If a corporation organized in this State is engaged in business in another State, and all its tangible property is outside this State, then its shares of stock owned by residents within this State are taxable in the same manner as stock in a foreign corporation."

"If a person is domiciled within the state, his personality, in connection with law, has its *situs* there also, and he may be taxed in respect of it at the place of his domicile. Within this rule full debts owing from a non-resident to a resident; and shares owned by residents in foreign corporations may be taxed to the owners even though the corporations

themselves are taxed in the jurisdiction where their operations are carried on. However, the maxim *mobilia sequuntur personam* is not of universal application, does not rest on any constitutional foundation, and gives way before express law; and a state may at its option impose taxes on tangible personal property within its limits irrespective of the residence or allegiance of the owner, although this would not be true of property merely passing through the state and not having acquired a *situs* therein." 1 Cooley on Taxation (2d ed.) 86.

In *Van Allen v. The Assessors*, 3 Wall 573-583, this court said:

"But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations."

In *Gordon v. Appeal Tax Court*, 3 How 132-149, it was said:

"The capital stock is another property—corporate associated, for the purpose of banking—but in its parts is the individual property of the stockholders in the proportion they may own them. Being their individual property, they may be taxed for it, as they may for any other property they may own."

In *Coe v. Errol*, 116 U. S. 517-524, the court said:

"We take it to be a point settled beyond all contradiction or question, that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their

houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situate to tax it also. It is hardly necessary to cite authorities on a point so elementary."

In the case of *Kirtland v. Hotchkiss*, 100 U. S. 491, bonds executed in Chicago and secured by a deed of trust upon real estate situate in that city were taxed under the laws of Connecticut against the owner who was a resident of that State. It was claimed that the statutes of Connecticut under which the tax was levied were unconstitutional because they violated, 1, the interstate commerce clause of the Federal Constitution, and 2, the Fourteenth Amendment to the Federal Constitution. In upholding the statutes of Connecticut this court said, (p. 498):

"Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for the purposes of taxation, if not for

all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign held Bonds supra*, the right of the creditor 'to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,' &c. *Cooley on Taxation*, 15, 63, 134, 270. The debt, then, having its situs at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the Federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. *Nathan v. Louisiana*, 8 How. 73; *Cooley on Taxation*, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizens of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

"Whether the State of Connecticut shall measure

the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere."

In *Bonaparte v. Tax Court*, 104 U. S. 592, a resident of Maryland owned bonds of the city, county and State of New York, of the city of Philadelphia, in the States of Pennsylvania and Ohio, which were taxed in Maryland in accordance with the laws of that State. It was claimed that they were exempt from taxation because the States under whose authority the bonds had been issued had exempted them, and that to tax them was in violation of Article 4, Section 1, of the Federal Constitution, that full faith and credit shall be given in each State to the public acts of every other State. This court held against this claim and said:

"The owner may be compelled to go to the debtor State to get what is owing to him; but that does not affect his citizenship or his domicile. The debtor State is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belongs to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the State in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself."

After an article has ceased to be an import from one State to another by being mingled with other

property in the latter State, it is a subject of taxation by the latter.

Nathan v. Louisiana, 8 How. (U. S.) 73-80.

In this case it was held that an annual tax of \$250.00 to the State of Louisiana upon a broker whose sole business was the buying and selling of foreign bills of exchange was not repugnant to the provision of the Federal Constitution "to regulate commerce with foreign nations and among the several States."

In *Urown v. Houston*, 114 U. S. 622, which is one of the leading cases on the subject, the State of Louisiana had assessed a tax upon coal mined in Pennsylvania and exported from Pennsylvania and imported into Louisiana, and, at the time the tax was assessed was afloat in the Mississippi River in flatboats in the original condition it was when exported from Pennsylvania. It had been shipped to the agents of the plaintiff in error to be sold by said agents by the boat load, and after the assessment was made more than half of the coal was exported in foreign steamships and the remainder sold into the interior of the State for plantation use by the flatboat load. The coal had been taxed in Pennsylvania and the tax paid by the plaintiffs in error and the coal was received in Louisiana in its original condition and in its original packages, and was at the time of the assessment still owned by the plaintiffs. The court said (p. 629):

"The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there for sale, without reference to the destination or use which the purchaser might wish to make of

it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer bound for foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans."

Again, at page 632, the court said:

"As to the character and mode of assessment, little need to be added to what has already been said. It was not a tax imposed on the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through the State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal has come to its place of rest, for final disposal or use and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or for sale. Take the city of New York, for example. When the asses-

soy of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain-fields of the west?"

To the same effect is *Pittsburgh, etc., Coal Co. v. Bates*, 156 U. S. 577.

The State of Indiana levies no discriminating tax upon stocks owned by its residents in foreign corporations. The tax is levied because the stocks are intangible personal property having its *situs* for the purpose of taxation in Indiana. The resident of Indiana has invested his money in stocks in foreign corporations, but he resides in Indiana and receives the protection of its laws, the benefits of its government, schools and administration of affairs generally.

In *American Steel & Wire Co. v. Speed*, 192 U. S. 500-521, in discussing *Woodruff v. Parham*, 8 Wall. 123, and *Brown v. Houston*, 114 U. S. 622, the court said:

"The Court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce."

The reasoning in the case of *Hatch v. Reardon*, 204 U. S. 152, seems to be directly in point upon the question argued by counsel for plaintiffs in error that the taxation of the stock of Isaac M. Darnell was an interference with interstate commerce. In

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gave this opportunity to the guilty party to *deal with the public* with the apparent ownership of the paper.

In all the cases of this class, without exception, the negligence of the owner has flowed from this voluntary surrender of possession and bestowal of opportunity to defraud upon another, and has been held to be the *proximate cause* of the deceit practiced upon an innocent party.

In the cases embraced in the second class there was no voluntary surrender of possession of the instrument by the rightful owner. It is not necessary that it be stolen by force, or as by a thief in the night. The wrongdoer may be trusted with access to it, have a key to its depository; may have manual possession of it as a servant or employé of the owner, such possession being the owner's possession—a situation most frequent in the case of a corporation which can only have possession of a document by and through its officers or servants. It need only appear that such servant or employé takes the instrument out of the owner's and into his own possession, and that act is performed without the knowledge and consent of the owner, and the existence of an estoppel is then negated. That act then becomes the proximate cause of the power and opportunity to defraud or deceive an innocent party with the wrongdoer's apparent title, and the true owner is not responsible.

And in the case of a corporation, the transfer from its possession and custody to the possession of a servant takes place when he does some act not within the scope of his employment by which he appropriates the instrument and uses it as his own without the knowledge of his employer; for a corporation is not responsible for the unauthorized act of its servant not done within the scope of his duties.

Knox *vs.* Eden Musee Co., 148 N. Y., 441; 31 L. R. A., 779.

Hill *vs.* Jewett Pub. Co. (Mass.), 13 L. R. A., 193.

Farmers' Bank *vs.* Diebold, &c., Co., 66 Oh. St., 367.

In such a situation the reasoning is simple. The owner has not clothed the servant with a power to deceive. The servant takes the power with the document, unknown to the owner; if he uses it, the deceit is complete. So long as the servant uses the document in accordance with his duty, it remains in the possession of the master. When he takes it away in violation of his duty, it leaves the possession of the master. This taking away is a necessary prerequisite to the opportunity to deceive, to deal with the public as owner, for which the rightful holder is not responsible.

Thus we are brought to the proposition that a crime is *necessary* in this class of cases before the wrongdoer may deceive others: he clothes himself with the indicia of ownership. For a servant to thus take away a document or other property from his master—although it has been intrusted to his custody—and convert it to his own use, is larceny at the common law.

1 Wharton Crim. Law (8th ed.), sec. 915.

11 Bishop Crim. Law (7th ed.), secs. 824, 825.

18 Am. & Eng. Ency. Law (2d ed.), pp. 474, 475, 511.

And see Code, District of Columbia, section 826, which defines grand larceny as the feloniously taking and carrying away anything worth more than thirty-five dollars, and section 732, which reads in part: "Any misappropriation of any of the money of any corporation or company formed under this act [which relates specifically to trust companies] or of any money, funds or property *intrusted* to it, shall be held to be larceny and shall be punished as such under the laws of said District."

We come now to a discussion of the facts of the case at bar, in order to ascertain under which of the two classes of cases it falls.

1. *There was no voluntary surrender by the plaintiff trust company to Myers of the possession of the certificates of Mergenthaler stock.*

Myers was a trusted servant of the company, and had been such for many years prior to his act of malversation. It was a part of his duties to handle within the banking house of the company, as acting note teller, certificates of stock pledged with the company, in order to return them to such customers as might pay their loans. He had no duty to pledge, sell or dispose of the company's securities or to take them out of its offices. While it does not appear he had access to the safe directly, he had such access indirectly through the secretary, to obtain stock certificates for the purpose above mentioned. Suppose a customer of the trust company appeared, paid his note, and Myers, in the ordinary course of business, obtained his certificates pledged as security therefor from the secretary. Up to the time he delivered them to the customer they were certainly in the possession of the company. The manual possession of Myers was its possession. Let us assume that when Nyman handed the certificates to Myers, on the occasion in question, Kelly had been present at the note teller's window waiting to receive his stock, and Myers, in good faith and without evil intent, had received them from Nyman, who had handed them to him for the purpose of delivery to Kelly. Until delivered to the latter the trust company would clearly have had possession of the securities. Suppose further that Myers, seeing Kelly waiting at his window, and yielding to sudden temptation, had, with the certificates of stock in his pocket, slipped out of a door, gained the street, and, entering the office of Hibbs & Company, sold the stock and converted the money to his own use in the manner described in the agreed statement of facts. Could it be doubted that he would then have been guilty of a larceny, as defined above, of taking from the trust company, without its knowledge or consent, the securities of

which it had possession up to the moment Myers left the four walls of its banking house? How did the absence of Kelly, and the fraud practiced upon the secretary, Nyman, when Myers falsely told him Kelly was there waiting to pay his loan and receive his stock, change the situation in the slightest degree? The certificates were handed to Myers by Nyman in good faith and in the usual course of business, solely for the performance of a duty which did not take Myers beyond the offices of the company. So long as he remained within these offices, where he belonged, he could not deal with the stock as his own, and the public could not deal with him as the owner of it. He was not "exhibited to the world as owner with the assent of his principal" (2 Kent Com., 627). His manual possession was the company's possession at that moment, exactly as it would have been if he had obtained the certificates in good faith on his part. In no sense could it be said that the company had, in the language of the cases cited in the first class, "intrusted the certificates to *another*" or to a "third person." It was only when Myers left the building of the plaintiff in error and took the securities with him, without the knowledge or consent of the Trust Company, that he, by committing larceny, got possession of them. He *then* became a "third person," a stranger to the company, and *then only* could the public deal with him as the apparent owner of the certificates.

Compare this situation with that in *Knox vs. Eden Musee Company*, *supra*. There Jurgens, the guilty employee, had access to the company's safe, where were deposited the surrendered certificates to be canceled by him. The president of the company had directed Jurgens to cancel them, and they were left in his care and under his control for that purpose. Counsel there urged that the improper use of the certificates might reasonably have been expected from that state of facts. To this suggestion the court declined to assent, for the reasons already quoted earlier in this brief. The court said:

"The certificates were at all times after their surrender, and before they were abstracted by Jurgens from the safe of the defendant, in the legal possession of the company. The company never placed them in the possession of Jurgens or invested him with the *indicia* of ownership. He had access to the safe as the mere servant of the defendant" (p. 783, 31 L. R. A.).

It is clear also that if Jurgens, after taking them from the safe, had canceled the certificates, as was his duty, they would then at all times have been in the company's possession. It was only when he left the office of the company to dispose of them that they came, by theft, into his own possession. Suppose the president of the defendant in that case, instead of placing the certificates in the company's safe and directing Jurgens to cancel them, had himself handed them to Jurgens for the purpose of cancellation by the latter; certainly, when Jurgens received them they would still have been in the possession of the company. The distinction between the supposed case and the real one is without a difference. Yet, applying to the former the ruling of the Court of Appeals in the case at bar, Jurgens would have been clothed with the *indicia* of ownership and the possession of the certificate, and estoppel would have ensued.

So, conversely, in the present case, following the reasoning of the Court of Appeals, if Myers had been given access to the safe so that he could have himself procured securities therefrom for delivery to customers who might be entitled thereto, and had on the occasion in question here gone to the safe, taken from it the Mergenthaler certificates and converted them as described in the agreed statement, the securities would have been considered stolen, no estoppel would have arisen, and recovery for the plaintiff would have been adjudged. We cannot see how the commission of a theft is negatived, or an estoppel is engrafted, or wherein the application of the principles declared in the cases in the second class is affected, by the

fact that Myers obtained the securities from the safe *through Nyman* for an apparent purpose in line with his duties and then absconded, instead of using a direct right of access to the safe to effect the same result.

Therefore there can be no doubt that the plaintiff company did not voluntarily surrender its possession of the certificates of Mergenthaler stock to Myers, but that he stole them from its possession; and it follows that the first and essential element of estoppel existing in every case of the first class is absent in this case, and as to that point it is within the principles of the cases of the second class.

The Court of Appeals considered that it was negligence for Nyman to hand or "intrust" the stock to Myers, and applied the rule that when a loss occurs, as between two innocent persons, it should fall upon the one whose act was the proximate cause of the loss. But that rule is not applicable to the case at bar. In the first place, as has already appeared, Nyman's act was not, as assumed by the Court of Appeals, the proximate cause of the loss; and this fact will be referred to hereafter. Again, to properly invoke the rule, some negligence must be found in the act claimed to be the proximate cause of the loss (*Schumacher vs. Green Copper Co.*, 117 Minn., 124, *supra*). If it were negligence in Nyman to follow the usual course of business and put trust and confidence in a servant or employee of the company, then every official act of an officer or employee of a corporation trusting another officer or servant is a negligent act.

The logical result of the decision of the Court of Appeals, therefore, is to preclude any officer or servant of the plaintiff in error, except the Secretary, Nyman, or such other officer or employee as may have originally received them, from having even a momentary possession of its securities endorsed in blank; because the instant he or the original recipient handed them to any other officer or servant the company would be open to the imputation of negligence

by reason of that fact, if the servant to whom such securities were so delivered—although for the performance of a duty within the banking room of the company—were to abscond and transfer them to a *bona fide* purchaser for value; and the company would then be estopped from claiming such securities or recovering their value. Such an extraordinary application of this rule is fraught with danger to the transaction of corporate business and is not sanctioned by the law. As we have already seen,

“There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft in order to preclude the master from reclaiming it, if stolen by the servant and sold to another. *Rapallo, J., in McNeil vs. Tenth Nat. Bank, 46 N. Y., 329.* The rule declared by *Ashhurst, J., in Lickbarrow vs. Mason, 2 T. R., 70,* frequently quoted, that ‘wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it,’ has no application to such a case.”

Knox vs. Eden Musee Co., supra (p. 783, 31 L. R. A.).

Myers was not given possession and clothed with a power of disposition, for it was never intended, nor was there any reason to suppose, that he would leave the banking-house of the plaintiff in error. It was not a duty incumbent upon Nyman to have anticipated that Myers would commit the crime of larceny if he handed to him the certificates (*Knox vs. Eden Musee Co., supra*), and if he had no such duty, he, of course, could not have been guilty of negligence in so handing them to Myers. The most that could be said is that the latter was given an “opportunity for theft.” To apply the rule in such a case would compel every corporation to employ a corps of detectives to watch the official acts of its officers and employees or to dispense with all save one of the latter. And in no case cited in this brief

under the second class was the rule applied, although in each opportunity for theft existed. Where an application of the rule was urged, it was refused.

2. *The crime of larceny was a necessary act before Myers could obtain possession of the certificates.*

What has heretofore been said has shown that without the commission of a theft the possession of the certificates in controversy would have remained in the possession of the plaintiff in error. A word may be added, however, with respect to the custom referred to in the agreed statement of facts (Rec., p. 6). This custom was by no means as sweeping as that which obtained in Boston at the time of the second trial of *Scollans vs. Rollins*, 179 Mass., 346, *supra*. There the usage was *to pass title* to certificates duly assigned in blank, by delivery, and that, so endorsed, they passed from hand to hand without inquiry as to the title of intermediate holders. The custom in the present case was that possession of certificates endorsed in blank was recognized as *evidence* of ownership. We might truly say that possession usually is *evidence* of ownership. But of what materiality is the existence of such a custom in this case? Before it could be invoked by Myers, he had to purloin the certificates from the trust company. While he remained within its banking-room the custom was nothing to him and could not operate. Nyman, though doubtless knowing of the custom, had no reason to suspect its operation, as he trusted Myers with the certificates for a purpose utterly inconsistent with their removal by him from the custody of the company and its banking office to a place where the custom could be employed. If, as we have already seen, it was not incumbent upon him to anticipate that Myers would commit larceny, still less should he have anticipated that there was danger of the custom being invoked, when that could not happen unless the theft of the certificates had first taken

place. For the theft of the certificates *necessarily* came between the act of Nyman in handing them to Myers and their conversion by Hibbs. Therefore, the custom is an immaterial circumstance in the present case, and should play no part in its determination.

From the above, then, it must appear that—

3. *The criminal act of Myers was the proximate cause of the conversion of the certificates of stock, and not the act of Nyman intrusting him with them as a servant of the trust company.*

Inasmuch as the Court of Appeals in its opinion has given much weight to the case of *Russell vs. Telephone Co.*, 180 Mass., 467, 469, already mentioned, saying in part (Rec., p. 20)—

“That case and this are quite analogous, for in both the delivery to the agent was obtained through fraudulent representations and for a very different purpose from that avowed.”

and counsel for defendant in error in that court relied upon it as an important and “absolute and direct” authority in support of his contentions, it may not be inapt at this point to further distinguish that case from the present, even with the risk of some repetition: it will then appear that no analogy exists, and that the two cases rest upon widely different principles arising from facts greatly dissimilar.

As we have seen, in the *Russell* case, although possession of the certificates of stock indorsed in blank was obtained by means of fraudulent representations, nevertheless the owner, believing in the truth of such representations, *voluntarily surrendered* such possession to the broker who made them, intending that he should take them away from her custody, and *knowing* that he would be able to deal with the public therewith by sale or pledge, because he was clothed with the power to use them as his own.

It is *this fact*, whether it be termed fraud or larceny or other technical crime, which is controlling in the opinion of the court.

If, in the present case, some broker had, though with fraudulent intent, entered the banking-house of the plaintiff in error, and requested the secretary, Nyman, to deliver to him the certificates of Mergenthaler in question for the stated, though untrue, purpose, let us say, of taking them to his own office and there exchanging them for a single certificate representing a like number of shares, and Nyman, believing in his honesty, had delivered the certificates (assuming this to be within the scope of his authority), and thus intrusted the broker with them, who thereafter converted them to his own use—then an analogy might exist between the two cases and the decision in the Russell case apply. In such a supposed case the Trust Company through Nyman would voluntarily, though induced so to do by fraud, have surrendered possession of the certificates to one not a servant of the company, with *knowledge* of opportunity and the power to deceive others with which the company would have then invested him. And the broker in such case would have received the certificates from the possession of the company *with its full consent*. The fraudulent conversion of the certificates might have been anticipated by the Trust Company in the delivery of the stock to the broker, clothed with the *indicia* of ownership. The controlling fact upon which the estoppel in the Russell case was predicated would have then been present.

From what has been said heretofore, the difference between the real facts in the present case and those just supposed appear at once. We have shown that the plaintiff in error did not voluntarily surrender possession of the certificates in controversy; that Myers was not intrusted with them to take out of its possession where he could pledge or transfer them; that no legal obligation rested upon the company to anticipate *both* the larceny of the

stock and its conversion thereafter; that Myers took them from the plaintiff company without its knowledge or consent, and that by the commission of such theft *alone* was it possible for him to have them where by dealing with them as his own he could deceive others. These points of difference absolutely destroy the foundation upon which in the Russell case the estoppel was erected, and they were completely overlooked by the learned Court of Appeals in the present case, when it classed the two cases as analogous. And in applying the Russell case the same learned court considered that the crime of Myers consisted in the fraud by which he obtained the certificates of Nymau, and ignored his real criminal act in taking them from the custody and possession of the Trust Company.

In concluding this branch of the argument we feel justified in asserting without fear of contradiction that no authority can be found in which the doctrine of estoppel has been applied to defeat the title of the rightful owner of a non-negotiable instrument, when the proximate cause of his loss was the criminal act of another, even though such other were given the opportunity to commit the criminal act by a repose of confidence in him, where no fact or circumstance existed to cause suspicion that such confidence would be abused. In those cases where estoppel has arisen the opportunity to the abuse of trust and to deal with the public as an owner has been directly and voluntarily bestowed and no criminal act has intervened to negative the direct and proximate causation of loss by the act of the rightful owner of property in voluntarily clothing another with power to deceive.

Therefore, by reason of all that we have said on this subject, and upon the authorities cited, we respectfully submit, that the case at bar falls clearly within the principles of the cases which we have designated as of the second class, and that the learned Court of Appeals erred in applying to the facts therein the doctrine of estoppel to defeat the right of the plaintiff in error to recover.

III.

The defendant in error is liable even though the court should consider the circumstances under which Myers obtained the stock in controversy such as to vest a good title in a bona fide purchaser for value.

The authorities cited under point I are applicable to the proposition just stated, because we have seen that the certificates of stock in controversy were stolen by Myers from the plaintiff in error, but the following suggestions are presented for the consideration of the court, assuming for the sake of the argument only, that the Court of Appeals was correct in its application of the doctrine of estoppel to the case at bar.

The very meaning of "*bona fide* purchaser" precludes knowledge on the part of such purchaser of a fraud committed. If any person buying stock under conditions in which an estoppel in his favor would otherwise obtain is cognizant of fraud or crime tainting the transaction or transactions by which the stock comes into his hands from the rightful owner thereof, he gets no title and the owner may recover his property in the hands of such person.

Going back a step, of course the one who perpetrates the fraud or crime has no title; his possession is tortious, and it is only when, the negligence of the owner being the proximate cause, a purchaser in good faith, who is *not an agent* of or who does not represent the wrongdoer, obtains the property that the owner suffers the loss.

In the present case no recovery is sought as against a *bona fide* purchaser. The title of an innocent holder is not involved. If it were, the defense of such title on the ground of the negligence of the owner sufficient to raise an estoppel might be appropriate, though in this case, as we have argued, inapplicable and unavailing. But here we have to deal, not only with one who makes no claim to the stock, but was the

agent of the wrongdoer and acted in no other capacity. The fact that he was without knowledge of the fraud does not relieve him of responsibility. He acted for one who committed the wrong, and the step when *bona fides* protected in a proper case was not reached, if at all, until the property had passed beyond the control of the perpetrator of the wrong and his agents. The protecting innocence of a *bona fide* holder cannot be extended to the agent of a wrongdoer. In the case of *Kimball vs. Billings*, 55 Me., 147, *supra* where, it will be remembered, a broker sold for a thief negotiable bonds payable to bearer, the court, in holding the broker liable for conversion, said:

"Nor is it any defense that the property sold was Government bonds payable to bearer. The *bona fide* purchaser of stolen bonds payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. The rule of law protecting a *bona fide* purchaser of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents."

In the case of stolen negotiable instruments even, although a *bona fide* purchaser gets a good title, the broker, as the innocent agent of the thief, is responsible for the conversion thereof.

In the case of non-negotiable instruments, such as certificates of stock indorsed in blank, no title vests in a *bona fide* purchaser if the property was stolen or unless it came into the hands of such purchaser by reason of the fault or negligence of the owner. In other words, the carelessness of the owner, if it was the proximate cause of the loss of the certificates, impresses a *quasi* element of negotiability upon them for that particular transaction and protects the purchaser. But that *quasi* element of negotiability in no manner affects the act and responsibility of the wrongdoer or his

agent, however innocent that agent may be, as we have seen in *Kimball vs. Billings*, *supra*, from which we have just quoted. In other words, the acts and conduct of the owner of stock certificates may be sufficient to defeat his title as against a *bona fide purchaser* from one who has wrongfully disposed of the owner's stock, but the wrongdoer is, of course, not relieved from responsibility, and his agent is equally responsible for a conversion of the property.

Therefore, it follows that even if the circumstances surrounding the taking by Myers of the certificates of Mergenthaler in question showed conduct on the part of the plaintiff in error sufficient to vest title in a purchaser, which we emphatically deny for the reasons and on the authorities hereinabove set forth, the defendant in error is none the less liable for the conversion of the certificates as the agent of Myers.

In its opinion, the Court of Appeals cites on this point the case of *Spooner vs. Holmes*, 102 Mass., 503, 507, which seems to be in part at variance with *Kimball vs. Billings*, *supra*. In the former case Government bonds were stolen from the owner by a servant who gave them to her sister, the latter being a domestic in another family. The sister left for Nova Scotia and thence sent some of the coupons payable to bearer to a broker, who received them in ignorance of the circumstances under which they had reached her. The broker sold them and duly remitted the proceeds. The court held that he was not liable in a tort action in the nature of trover, but placed its decision on the ground that the coupons payable to bearer were the equivalent of currency; admitting, however, the rule that the sale of goods by an innocent agent of one who has wrongfully obtained them from the true owner, renders the agent liable in trover to the latter.

In conclusion, we quote further from the opinion of the court in *Swim vs. Wilson*, 90 Cal., 126, *supra*:

"In this case it was the duty of the defendant to know for whom he acted, and unless he was willing

to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal."

For all the reasons above stated and upon the authorities cited it is respectfully submitted that the judgment of the Court of Appeals should be reversed with direction to reverse the judgment of the Supreme Court of the District of Columbia.

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[1962:]

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JAMES H. MCKENNEY,

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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 79

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY,
Plaintiff in Error,

vs.

WILLIAM B. HIBBS, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia in an action of trover brought by the plaintiff in error, hereinafter called the plaintiff, against the defendant in error, hereinafter referred to as the defendant. The case was tried in the lower court upon an agreed statement of facts, set forth at pp. 4-7 of the record, of which the following are the material facts:

The plaintiff, engaged for many years in a general banking business, including the making of loans to its customers on promissory notes secured by collateral, had received from one T. M. Kelly, as collateral security for his promissory note held by it, certain certificates of the capital stock of the Mergenthaler Linotype Company, among which were certificate No. 1105, representing twenty shares, and No. 669, representing ten shares, upon each of which certificates was endorsed an assignment and power of attorney, blank as to the assignee, duly executed by Kelly and attested, possession of which stock certificates, so assigned in blank and attested, was and for many years had been by the custom of banks, brokers and others dealing therein, and which custom was known to the plaintiff, recognized and accepted as evidence of ownership or authority to sell, pledge or otherwise deal therewith as an owner might do, in the absence of knowledge or cause of suspicion to the contrary. Among its employees was one Myers, for many years in its service as a note teller, one of whose duties it was to receive from the plaintiff, through its secretary, securities held by it as collateral, for the purpose of delivering the same to customers upon their payment to him of the indebtedness for which the securities were held. On May 26, 1904, Myers applied to the secretary for the Kelly Mergenthaler securities, who thereupon gave the same to him for the purpose of delivery to Kelly, the certificates, as stated, being so assigned in blank as, to the knowledge of the plaintiff, to constitute evidence to all banks, brokers or others dealing in such securities, that Myers, being in possession of them, was their owner, with authority to sell, pledge or otherwise deal with them as an owner might do. On the following day, the certificates having been left by the plaintiff in the possession of Myers overnight, unaccounted for, he presented them at the office of the defend-

ant, a stock broker, with instructions to sell them for him, which, the defendant being then absent from Washington, his cashier caused to be done through another broker, and accounted for their proceeds to Myers. Neither the defendant, his cashier, or the broker through whom the sale was effected, knew, suspected, or had cause to suspect that Myers was not the owner of the stock. Kelly had not paid his debt to the plaintiff, nor requested the delivery of the stock certificates to him.

It is apparent, from these conceded facts, that the loss arose wholly through the misplaced confidence of the plaintiff in one of its own employees. Its action below was an attempt to impose the resulting loss upon the defendant. The trial court rendered a judgment for the defendant, which was affirmed by the Court of Appeals, and the case is here on the plaintiff's writ of error to determine the rightfulness of the judgment.

POINTS AND AUTHORITIES.

The opposing brief considers, as preliminary questions which it is supposed will not be disputed, certain alleged principles of law which, while in themselves perhaps true, it is submitted are misleading in the application sought to be made of them.

In the first place, while the authorities cited to that effect do maintain that certificates of stock are not negotiable instruments, they are nevertheless universally recognized as possessing certain attributes in common with commercial paper, which have led to their designation by some courts as "*quasi-negotiable*," although the use of that term is condemned by the text writers as being, itself, misleading. 26 Am. & Eng. L., 831.

Thus, it is declared, "stock certificates of all kinds have

been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. * * * Whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him." *Bank vs. Lanier*, 11 Wall., 369, 377; *Earle vs. Carson*, 188 U. S., 42, 46; *Supply Ditch Co. vs. Elliott*, 10 Col., 327, 333; *Bank vs. Cemetery Co.*, 120 App. Div. (N. Y.), 119; *5th Nat. Bank vs. R. R. Co.*, 137 N. Y., 231, 238; *Jarvis vs. Rogers*, 13 Mass., 105; *Lyman vs. Bank*, 81 App. Div. (N. Y.), 367, 371.

Illustrative of the extent of this doctrine is *Matthews vs. Bank*, Holmes (U. S.), 396, 407, in which a stock certificate, originally for two shares, had been fraudulently altered so as to purport to be for two hundred shares, issued as collateral to a bank by which it was received in good faith, and, on payment of the loan secured by it, its cashier executed a transfer in blank on the back of the certificate and delivered it to the debtor, from whom the plaintiff in good faith received it. In a suit by him against the bank to recover the loss, the latter was held liable as for a warranty of the genuineness of the certificate, because of its endorsement, the court saying: "The certificate accompanied by the transfer, executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential in the usage and necessity of modern commerce to make such certificates available in commercial transactions."

So in *Bridgeport Bank vs. R. R. Co.*, 30 Conn., 231, 275:

"Since the decision of the case of *McNeil vs. Tenth National Bank*, above cited, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper." *Leitch vs. Wells*, 48 N. Y., 585, 613.

To similar effect are *Steacey vs. R. R. Co.*, 5 Dill., 348; *Bank vs. Pinson*, 58 Mass., 421, and the cases cited *infra*.

The next proposition, stated preliminarily in the opposing brief, is that, since no custom or usage can alter or affect a well-settled principle of law, no custom or usage of brokers to regard certificates of stock assigned in blank as negotiable, makes them so, or alters the law applicable to them as non-negotiable securities. In the first place, the custom or usage presented here is not merely one recognized by brokers, but by the courts, as presently shown, see *infra*, p. 25; and, secondly, the authorities cited in the brief (p. 6), in so far as applicable at all, deal with customs and usages which conflict with the law. *Thompson vs. Riggs*, 5 Wall., 663, perhaps the most applicable of the cases cited, was the case of a local usage contrary to law, and, in disallowing it, the court said: "Customary rights and incidents universally attaching to the subject-matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded." In the case at bar, the custom involved is not in conflict with any law, and, under the agreed facts, was not only the recognized custom of banks, brokers and others dealing in stocks, but was directly known to the plaintiff. The rule applicable to such a custom is, that "parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary." *Robinson vs. United States*, 13 Wall., 363, 366; *Hostetter vs. Park*, 137 U. S., 30, 40; *Shipman vs. Mining Co.*, 158 U. S., 356, 364.

In *Thompson vs. Riggs*, 5 Wall., 663, and in *Barnard vs. Kellogg*, 10 Wall., 383, cited upon this point by the plaintiff, it is further to be noted that the decisions turned upon the admissibility of evidence as to the custom. In the case at bar, its existence, and the plaintiff's knowledge of it, are admitted in the agreed statement of facts, nor was any exception taken to its consideration by the court.

The third question considered preliminarily in the opposing brief, that a pledgee of certificates of stock has sufficient title to maintain an action for damages for their conversion, is conceded, but, so far from aiding, is fatal to plaintiff's case. It delivered the certificates in controversy to Myers for the express purpose of having him transfer its title to and property in them to another, knowing, at the time, that they were so endorsed as to make him appear the owner, and to enable him to transfer the title to anyone who innocently received them from him. It is by virtue of the very title, which it thus entrusted him to transfer, that it brought its action below;—leaving it no other basis for recovery than the fact that its agent, selected and entrusted by itself to transfer its title to one person, transferred it to another, through the aid of its own act in making him the apparent owner, authorized to transfer to any person or persons he thought proper. Its position, in short, is the same as that which Kelly or any other owner of title would have occupied, had he placed Myers in possession of the certificates, with all the indicia of ownership, for delivery to a particular person, and Myers had delivered to another, without suspicion or cause for suspicion on the part of the latter as to his good faith in doing so.

THE SINGLE QUESTION PRESENTED.

The case, it is submitted, presents but a single question of law, namely:

Is a broker who innocently sells stocks for a principal, not their rightful owner but possessing all the indicia of ownership, liable to the true owner for conversion, where his principal's possession and indicia of ownership were given the latter by the true owner?

The answer to this question, we submit, is found in the legal principle, "Where one of two equally innocent parties must suffer loss, through the fraudulent act of a third, the loss should fall on him who, through either negligence or misplaced confidence, gave opportunity for the fraud." And this principle, we submit, knows no such distinctions between innocent purchasers and equally innocent brokers or other agents used by the wrongdoer in effecting sale, as is contended for in the brief for the plaintiff in error. No such distinction can exist in reason or principle, and none is supported by any authority.

The cases principally cited on behalf of the plaintiff in error are those in which property, stolen from the true owner, has been sold through the instrumentality of auctioneers, brokers or the like, and in which the latter have been held liable to the owner for the value of the stolen property thus disposed of. To this class of cases belong *Koch vs. Branch*, 44 Mo., 542; *Hoffman vs. Carow*, 22 Wend., 285; *Swim vs. Wilson*, 90 Cal., 126; *Bersich vs. Marye*, 9 Nev., 312; *Kimball vs. Billings*, 55 Me., 147; *Coles vs. Clark*, 3 Cush., 399; *Kearney vs. Clutton*, 101 Mich., 106; *Board of Education vs. Sinton*, 41 Ohio St., 504; *Hill vs. Jewett Pub. Co.*, 13 L. R. A., 93; *O'Herron vs. Gray*, 168 Mass., 573; *Farmers' Bank vs. Diebold Safe & Lock Co.*, 66 Ohio St., 367; *Bangor Elec. L. & P. Co.*

vs. Robinson, 52 Fed., 520; Doran vs. Miller, 124 Ill. App., 551; S. C., 151 Ill., 527, etc. And with respect to the remaining citations for the plaintiff in error, if the transaction was not strictly one of theft, it will be found that the courts treated them as in substance cases of theft, and based their decisions upon that footing. Thus in Shaw vs. R. R. Co., 101 U. S., 557, the verdict having established the fact that the bank did not lose its possession of the bill of lading negligently, the court accordingly treated the case (p. 564) as one of "a lost or stolen bill of lading," the court finding, further (p. 566), that the purchaser had reason to believe that his assignors had no right to negotiate the bill. And in Schumacher vs. Green Cananea Copper Co., 134 N. W., 510, supposed by plaintiff's counsel to be latest decision upon the subject, the court found that the stock was deposited with the bank, and not with its cashier by whom it was abstracted, and for whose conduct, therefore, the owner, who was guilty of no negligence or misplaced confidence in leaving it as collateral for a loan with a reputable national bank, was not responsible. This class of authorities, we submit, are by this very fact wholly removed from any such analogy to the case at bar as to make them relevant, in any degree, to the inquiry under consideration. In them the wrongdoer, not having acquired his *indicia* of ownership through the negligence or misplaced confidence of the owner, but by theft, the latter is not chargeable with having furnished opportunity for the fraud. The principle contended for by the defendant, and which the lower courts sustained and made the basis of their judgment, was, in them, in no way involved.

This consideration renders immaterial, also, the contention for plaintiff, at p. 39 of its brief, that a servant taking over his master's property entrusted to his custody may be guilty of larceny. The question is, not the grade, or name,

of the wrongdoer's offense, but whether the owner negligently or through mistaken confidence gave occasion or opportunity for the fraud. If he did so, then he rather than the other innocent person should bear the loss, even though the wrongdoer was guilty of theft. Even in cases of theft, "it may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness." *Shaw v. R. R. Co.*, 101 U. S., 565.

"The qualification of the rule, as not applying when the instrument is stolen, was not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not entrusted the agent with the document, and, therefore, is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough, if the estoppel is based upon the principle that, when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But, in a case like the present, the agent has been entrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not." *Russell vs. Telephone Co.*, 180 Mass., 467.

To like effect, see *Green vs. Grigg*, 98 App. Div., N. Y., 445, 449.

AUCTIONEERS AND BROKERS LIABLE, WHEN AND WHY?

It is only in the cases in which the owner is free from fault that an innocent auctioneer or broker is held liable to him, and this for an entirely proper and simple reason. A purchaser in such cases, however innocent, acquires no title,

and the rightful owner may, if he will, retake the goods from him, in which case the purchaser may recover from the auctioneer or broker the purchase money paid, upon the implied warranty of title which accompanies every sale of personal property. To permit the true owner to recover the purchase money directly from the auctioneer or broker accomplishes, simply, the dual purpose of avoiding circuity of actions, and of enabling the latter to make good the implied warranty of title to the purchaser, who, by such recovery, acquires for the first time the title to the goods purchased, and which title the auctioneer or broker impliedly warranted in making the sale. But no ground exists for holding the auctioneer or broker liable in any case in which the true owner is without recourse against the purchaser, except, of course, where the auctioneer or broker was chargeable with fault or notice.

THE PRINCIPLE DETERMINING THIS CASE.

The proposition is now recognized as elementary that, wherever the act, conduct or omission of one party has led to such alteration in the position of another that, if the truth in respect thereto be shown, such other party will be damaged, the first party is thereby estopped to show the truth, however much he may be damaged by such estoppel, whether his fault consisted of fraud, misrepresentation, negligence or over-confidence in another.

The rule "has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on." *Daniels vs. Tearney*, 102 U. S., 415, 420.

Where one of two innocent persons must suffer the loss occasioned by the wrongdoing of a third, the one who by his negligence or inadvertence has placed it in the power of the wrongdoer to perpetrate the wrong which would not otherwise have been done, must suffer the loss, rather than the other innocent party. *Leather Mfg. Bank vs. Morgan*, 117 U. S., 96, 109-10; *Fifth Congregational Church vs. Bright*, 28 D. C. App., 229; *Commercial Nat. Bank vs. Compress and Warehouse Co.*, 133 Fed. Rep., 501, 504.

"There is no rule of law of which the equity is more manifest, or which is better sustained by reasons of public policy, than that which casts a loss, resulting from the fraud of a third person, upon the party who, by employing and entrusting such person, enabled him to commit it." *Fatman vs. Lobach*, 1 Duer, 354, 361.

"The owner of the stock should be relegated for his remedy to the unfaithful agent whom he trusted, who asserts that he is amply able to respond, and upon whom there has been no demand. The plaintiff should not suffer loss in innocently parting with his money under the circumstances, and upon apparent evidence of title presented by the fraud of Ritts, and made possible, accepting the defendant's story, by his own negligence and misplaced confidence." *Talcott vs. Standard Oil Co.*, 149 App. Div. (N. Y.), 694.

"If the defendants placed undue confidence in Michaels, it is but the familiar case of imposing the burden upon him who unwisely or unguardedly reposed the confidence." *Armour vs. R. R. Co.*, 65 N. Y., 111, 122-4.

"When the owner of property in any way clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him,

they should be protected." *Cowdrey vs. Vandenburg*, 101 U. S., 572, 574.

Although frequently termed estoppel *in pais*, or equitable estoppel, it is equally available at law and in equity. *Dickerson vs. Colgrove*, 100 U. S., 578; *Kirk vs. Hamilton*, 102 U. S., 68, 77; *Leather Mfg. Bank vs. Morgan*, 117 U. S., 96; *Drexel vs. Berney*, 122 U. S., 241, 253; *Wehrman vs. Conklin*, 155 U. S., 314, 327; *Green vs. Grigg*, 98 App. Div., 445.

By common consent, the leading case upon the question under consideration is *McNeil vs. Tenth Nat. Bank*, 46 N. Y., 325. In it, a blank power of attorney and assignment were executed by the owner of corporate stock, and the stock delivered as security for an indebtedness to a firm of stockbrokers who subsequently became insolvent, after having pledged the shares with a bank to secure an indebtedness of their own. The court held that while, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he himself has, this is a truism predicable of a simple transfer from one party to another where no other element intervenes, and which does not interfere with the well-established principle that, where the true owner holds out, or allows another to appear as the owner, or as having full power of disposition, and innocent third parties are thus led into dealing with such apparent owner, they will be protected; that their rights do not depend upon the actual title or authority of the party with whom they deal, but are derived from the act of the real owner, which estops him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to appear to be vested in the party making the conveyance; that, while simply entrusting the possession of a chattel to another is insufficient to preclude

the real owner from reclaiming his property in case of an unauthorized disposition of it, yet if the owner entrusts, not merely the possession, but also written evidence of title thereto, and of an unconditional power of disposition, the case is vastly different,—there is no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary or under contingencies to arise, and, if the contingencies are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case can not be distinguished from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power; that the holder of such a certificate and power as was given in that case [as in this] possesses all the external indicia of title and an apparently unlimited power of disposition; and that, by leaving the certificate in the hands of his brokers, accompanied by such an instrument, he in fact substituted his trust in the honesty of his brokers for the control which the law gave him over his own property, and the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers whose money the brokers were thereby enabled to obtain.

That this case is not distinguishable from the case at bar seems scarcely to be disputed in the opposing brief. Here, as there, the plaintiff placed into the hands of the wrongdoer the stock certificates in such form as allowed him to appear the owner thereof, with full power of disposition; here, as there, there was no occasion for the delivery of the certificates unless it was intended that they should be used by the depositary for the purpose of making transfer of the plaintiff's title; here, as there, the contingency upon which it was to be used might have been expressed on the face of the instrument, but, instead, was permitted by the plaintiff to remain in confidence between

itself and the depositary; here, as there, the case cannot be distinguished from that of an agent who receives instructions qualifying or restricting an apparently absolute power; here, as there, the person, constituted by the act of the plaintiff the holder of the certificate and power of attorney, was given all the external indicia of title and an apparently unlimited power of disposition, and here, as there, by placing the certificates in the hands of its agent, accompanied by the blank assignment, the plaintiff in fact substituted its trust in the honesty of that agent for the control which the law gave it over the certificates, the consequences of a betrayal of which trust should fall upon the party who reposed it, rather than upon innocent strangers, whether purchasers or brokers, with whom the plaintiff's depositary or agent was thus by itself enabled to deal.

The only answer, seemingly, of the plaintiff in error to *McNeil vs. Tenth Nat. Bank*, is *Knox vs. Eden Musee Co.*, 148 N. Y., 441, which is relied upon as overruling or at least as distinguishing *McNeil vs. Tenth Nat. Bank* from cases like the present. On the contrary, we submit, there is no conflict whatever between the two cases, and the only distinction between them is one of fact, namely: In the *McNeil* case, the plaintiff had voluntarily placed his stock certificate, assigned in blank, in the hands of his brokers, who had thereafter wrongfully hypothecated it; while in *Knox vs. Eden Musee Co.* the defendant had not voluntarily placed its stock certificates in the hands of the wrongdoer, but the latter had stolen them from the defendant's safe, to which he had a key, and therefore access. The ground of the court's decision, as quoted at p. 30 of the plaintiff's brief, is, the italics being ours, that "the employment of a servant to whom is entrusted the master's property, *with no power of disposition*, is not alone such a putting of trust and confidence in the servant by the master

as to enable the latter by his wrongful act to defeat the master's title." In the case at bar, the certificates were entrusted to the servant *with* the power of disposition, being given him for the express and only purpose of transferring the title thereto to Kelly, and thereby divesting the title owned by it, and in respect to which it now sues. If, in *McNeil vs. Tenth Nat'l Bank*, the brokers had merely been given access to a box in which the plaintiff kept his stock certificates, and had stolen them therefrom, the case would have been analogous to *Knox vs. Eden Musee Co.*; while if, in the latter case, instead of being merely afforded access to the box in which the certificates were kept, they had been put by the Eden Musee Company into the wrongdoer's hands for delivery to Kelly, and he had sold them to an innocent third person instead, there can be no question that the doctrine of *McNeil vs. Tenth Nat'l Bank* would have been applied.

This distinction is recognized in the quotation printed at p. 32 of plaintiff's brief from the opinion in *East Birmingham Land Co. vs. Dennis*, 85 Ala., 565, which was another case of a certificate stolen from the vault of a bank, the italics being those which appear in the brief for the plaintiff in error: "*There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, endorsed in blank, is clothed with power as agent or trustee to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust*"—a case in all respects like the one at bar, in which Myers was by the plaintiff placed in possession of the certificates, endorsed in blank, and was clothed with power as its agent or trustee to deal with them to a limited extent, namely, the extent of transferring the title thereto by delivery to Kelly, and who transferred it otherwise by exceeding his powers and in breach of his trust. The quotation from the opinion continues: "In such cases,

it has often been held that the true owner, having *conferred on the holder by contract* all the external indicia of title, and an *apparently unlimited power of disposition* over the stock, 'is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner,' " citing, among other cases, *McNeil vs. Tenth National Bank*. The rule thus stated is unquestionably correct, and we submit is conclusive of the present case.

The case of *Schumacher vs. Green Cananea Copper Co.*, 134 N. W. Rep., 510, already referred to and much relied upon in the opposing brief (pp. 33-5), is entirely similar in character. There, as stated, the plaintiff had deposited, as collateral to secure a loan, a certificate of stock, endorsed in blank, with the First National Bank of Ironwood. The court found (plaintiff's brief, p. 35) that the bank was a national bank in good standing, and that the pledging of stock certificates as security for loans at banks is so common and extensive in the business of the world that no one questions the care and prudence of one thus entrusting his stocks with them as collateral, it being customary, and perhaps necessary, to deposit them so endorsed. The cashier, as stated by the opposing brief, had stolen from the bank the security in controversy and sold it through a broker to an innocent purchaser. The court held, first (plaintiff's brief, p. 34), that if the bank, *i. e.*, the party to whom the plaintiff entrusted the certificate, had sold it, the purchaser would have taken a good title, "for the weight of authority is that where, by a wrongful or unauthorized act, two innocent persons have been placed in a situation where a loss must be borne by one of them, it falls on the one who first trusted the wrongdoer, and put in his hands the means of inflicting the loss. *Scollans vs. E. H. Rollins & Sons*, 179 Mass., 346; 88 Am. St. Rep., 386; 60 N. E., 983; *East*

Birmingham Land Co. vs. Dennis, 85 Ala., 565; 2 L. R. A., 836; 7 Am. St. Rep., 73; 5 So., 317. But the court found that the act of abstracting and selling the certificate was not the act of the pledgee bank, but of one of its officers, for a purpose personal to him. In our opinion this finding is abundantly supported." In the second place, the court held that, in pledging the certificate endorsed in blank with the bank, the plaintiff was not negligent; and, in the third place, that the plaintiff, having "dealt with and entrusted the bank—not any of its officers," the cashier, who abstracted it, was to be regarded as an "intermeddler and outsider," unless the disposition of the property was the act of the corporation. But suppose, in this case of Schumacher vs. Green Cananea Copper Co., the bank had delivered the stock certificate to its cashier, so endorsed as to confer upon him all the indicia of ownership and power of absolute disposition, for the purpose of having him deliver it to a third person, in breach of which misplaced confidence he had sold it through the broker. Is it not plain that the title to the purchaser would have been upheld? Especially where the question arose, not in an action by the owner, but, as it does here, between the bank and an innocent third party?

At pp. 36-7, the learned counsel for the plaintiff in error lay down three elements which, according to their own contention, are necessary to enable the owner to recover in an action like the present, namely:

1. That "*the possession of the document by the wrongdoer is obtained without the knowledge or consent of the owner of the instrument, and there is no voluntary surrender thereof to the former.*"

In the case at bar, the stock certificates were voluntarily placed in the hands of Myers by the secretary of the plaintiff company, in the ordinary, regular course of his duties

and of the prosecution of the business of the bank. In other words, since the plaintiff is a corporation, which can only act through its duly constituted officers, in the performance of their duly assigned duties, the certificates were voluntarily placed by the plaintiff in the hands of Myers.

2. *"Before the wrongdoer can obtain possession of the document, a criminal act such as larceny, or a taking away without consent is necessary, as distinguished from the possible use of a technical criminal act by way of fraud to induce a 'voluntary surrender' of possession of the instrument."*

Here, Myers did not obtain possession by larceny or a taking away without consent, but, in the terms of the element or proposition laid down by opposing counsel, he made use, simply, of a possible criminal act "by way of fraud to induce a voluntary surrender of possession of the instrument."

3. *"The criminal act is the 'proximate cause' of the loss or conversion of the document; or, in other words, is the proximate cause of the opportunity afforded the wrongful holder of the instrument to transfer it to an innocent purchaser or pledgee."*

In the present case, the criminal act was the sale of the stock certificates, *after* they had been voluntarily placed in the hands of Myers by the plaintiff.

It is argued, at pp. 40-1 of plaintiff's brief, that Myers' possession of the certificates was constructively the possession of the plaintiff until he left its premises for the offices of the broker, and, therefore, his manual possession being the company's possession, the latter can in no sense be said to have "entrusted the certificates to another," or to a "third person." If this distinction is sound, then any principal who entrusts his certificates, endorsed in blank, to his broker to negotiate a loan for him, may recover them from

any innocent third person to whom they may be sold by the broker in breach of the confidence reposed in him by the owner;—the broker's possession is constructively that of the owner, unless and until the certificates are pledged, and the owner has never entrusted their possession to the broker at all. The possession of the agent, is, always, constructively that of the principal; but this fact has never been held to exclude the rule that, where either the principal or some other equally innocent person must bear the loss of the agent's fraudulent conduct, its burden shall fall upon him whose misplaced confidence gave the agent the opportunity to defraud.

Nor can the plaintiff's case be aided by the supposed analogy of a case in which Myers had been given access to the safe, and by means of such access had abstracted the certificates and converted them to his own use, thereby, under the doctrine of *Knox vs. Eden Musee Co.* and of similar cases cited, stealing them. Here, they were placed in his possession by the plaintiff, for the purpose of disposing of them in the line of its business, and for its purposes. Conceding for the purposes of argument that the manner in which he disposed of them was larceny, this *followed* possession, gained through misplaced confidence and not by theft. Nor does the rule which imposes the loss upon him who reposed the mistaken confidence require, as suggested at p. 43 of the brief, that the confidence was negligently given;—to do so would be to abrogate the rule. Neither in *McNeil vs. Tenth Nat'l Bank*, nor in any one of the long series of cases which have adopted its doctrine, was the owner held liable because of negligence in selecting his broker, his agent, or his depositary of the securities. Nor is the distinction, attempted to be drawn at p. 47 of the brief, between delivery of the certificates to a broker for an act to be performed at his office, and their delivery to

Myers for an act to be performed in the office of the plaintiff, capable of being sustained upon any principle. In either instance, the case is one of loss through the misplaced confidence of the plaintiff in an agent, which must fall either upon itself, or upon another equally innocent, and less responsible for the fraud.

Returning to *McNeil vs. Tenth Nat. Bank*, the application of which to the present case is pointed out at pp. 13-14, *supra*, it has been cited, approved and followed in the following among other cases: *Cowdrey vs. Vandenburg*, 101 U. S., 576; *Driscoll vs. Mfg. Co.*, 59 N. Y., 96; *Armour vs. R. R. Co.*, 65 N. Y., 111, 122-4; *Bank vs. Livingston*, 74 N. Y., 223; *Simpson vs. Del Hayo*, 94 N. Y., 189, 194; *Brady vs. Bank*, 65 App. Div. (N. Y.), 212; *Lyman vs. Bank*, 81 App. Div. (N. Y.), 367, 371; *McLean vs. Griot*, 118 App. Div. (N. Y.), 100; *Talcott vs. Standard Oil Co.*, 149 App. Div. (N. Y.), 694; *Andrews vs. R. R. Co.*, 159 Mass., 64; *Bank vs. Dewar*, 6 Ill. App., 294; affirmed 115 Ill., 22; *McCarthy vs. Crawford*, 238 Ill., 38; *Moore vs. Bank*, 55 N. Y., 41.

In *Moore vs. Bank*, *supra*, the rule laid down in *McNeil vs. Tenth Nat. Bank* is upheld on three grounds, namely:

(1) It is contrary to justice and conscience to permit one who has clothed another with the indicia of ownership and power of disposition, to assert his real title against an innocent purchaser; (2) any other rule would open the door for the perpetration of frauds upon purchasers from such apparent owners; and (3) such circumstances present a proper case for application of the legal maxim that, where one of two innocent persons must sustain a loss through the fraud of a third, such loss should fall upon the one whose act has enabled the fraud to be committed.

The principle of *McNeil vs. Tenth Nat. Bank* has been declared, though the case is not cited, in *Fatman vs. Lobach*, 1 Duer, 354, 361; *Del Fosse vs. Bank*, 98 Ill. App., 123;

5th Nat. Bank vs. R. R. Co., 137 N. Y., 231, 238; Johnson vs. Milmine, 150 Ill. App., 208, 218—the first of these cases being much older than the McNeil case.

In Cowdrey vs. Vandenburg, 101 U. S., at p. 576, this court cites and approves McNeil vs. Tenth Nat'l Bank for the proposition that "the rights of innocent third parties * * * 'do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence,' "—*i. e.*, through either—"he caused or allowed to appear to be vested in the party making the conveyance.' "

And the foregoing has long been the recognized rule in this District, upon the authority of the cases cited. Strong vs. District of Columbia, 4 Mack., 252-3; Nat. Sav. & Trust Co. vs. Gray, 12 D. C. App., 276—the last named case citing, also, Johnston vs. Laflin, 103 U. S., 804.

Other cases in New York are Leitch vs. Wells, 48 N. Y., 585; Holbrook vs. New Jersey Zinc Co., 57 N. Y., 616; Cushman vs. Jewelry Co., 76 N. Y., 365; Talmage vs. Bank, 91 N. Y., 531; while Laughlin vs. District of Columbia, 116 U. S., 485, is another case in this court which proceeded upon the same principle.

In O'Herron vs. Grey, 168 Mass., 573, cited by the plaintiff, the guardian of two infants had deposited certificates for shares of stock with a national bank for safe-keeping, upon which she afterwards borrowed money from the bank for her personal use, endorsing on the certificates a blank form of transfer, signed with the names of the infants by herself as guardian. A few days later the cashier, one Francis, who had access to the vault where the certificates were kept, but, in so far as the report shows, had

no duty or authority in connection with them, took them from the vault, without authority from anyone, and delivered them to the defendants as security for a debt of his own—the case being thus analogous in all respects to *Schumacher vs. Green Cananea Copper Co., supra*. Thereafter the defendants presented the certificates to the company which had issued them, and applied for a transfer, which the corporation declined to make without a decree of the Probate Court authorizing sale of the stock, whereupon Francis presented a petition to the Probate Court for such leave, which he signed “Catherine O’Herron, Guardian, by E. L. Francis,” without the authority of the guardian; and a decree in the usual form, authorizing sale or transfer of the whole or any part of the stock, was thereupon passed and the transfer made. The suit was by the wards against the person who had loaned money to Francis upon the stock, and they were held entitled to recover on the grounds, first, that the signature of the guardian on the back of the certificates disclosed the trust relationship, which was sufficient to put the defendants upon inquiry; secondly, that the decree of the Probate Court did not help defendant’s case, first, because it was not passed until long after the transfer to him had been made; secondly, because it authorized a sale of the stock, and not a pledge of it—still less a pledge for the benefit of others than the plaintiffs, and, thirdly, because the Probate Court had acquired no jurisdiction of the case by the unauthorized signature and appearance of Francis.

Scollans vs. Rollins, 179 Mass., 346, another authority cited by the plaintiff, was twice before the Supreme Judicial Court of Massachusetts. When first there (173 Mass., 275) the decision was, only, that, where bonds bearing a blank assignment were deposited in the safe of a firm for safekeeping, merely, and one of its members afterwards ab-

stracted and pledged them as security for a loan to his firm, the fact that the assignments were in blank, *in the absence of evidence of custom or usage* that certificates so endorsed passed from hand to hand without inquiry as to the right of the bearer to dispose of them, created the presumption that they were intended only to aid the owner in securing their registration. Upon the second trial of the case, the evidence of the custom referred to was adduced, whereupon the case was again taken up and the judgment affirmed (179 Mass., 346), the court declaring (pp. 352-3) that, if such certificates should be stolen, even a *bona fide* subsequent holder would have no claim to them, but that, "if the owner of the instrument intrusts it to another, he does so charged with notice of the power to deceive which he is putting in that other's hands, and, if loss follows, he must bear the burden."

This was followed by *Russell vs. Telephone Co.*, 180 Mass., 467, in which the same doctrine is declared and applied notwithstanding the fact that the rightful owner was an aged woman, unfamiliar with business *and unacquainted with the custom in question*; and notwithstanding the further fact that the fraudulent act was, it was claimed, theft under the laws of Massachusetts. The certificate had been signed in blank and delivered to the agent solely for the purpose of surrender to the company so that a new certificate could be issued to the owner, including some additional shares to which she was entitled; the agent, as in the case at bar, having from the beginning sought and obtained it for the purpose of its wrongful conversion. The court, by Mr. Justice Holmes, C. J., said:

"The plaintiff's intestate entrusted a certificate of stock, endorsed in blank, to a fraudulent agent, and he, instead of using it for the purpose for which it was entrusted to him, obtained an advance from the

defendant by giving the certificate in pledge. The case, therefore, so far falls within the general reasoning of *Scollans vs. Rollins*, 179 Mass., 346, and the usage referred to in that case was found to be proved. In order to avoid the intimations of *Scollans vs. Rollins*, the plaintiff sets up that, in this case, only the possession of the certificate, not the property, passed to the agent, and that, as the possession was obtained by fraud, it was obtained by larceny in judgment of law. In *Scollans vs. Rollins*, it is admitted that the general principles there laid down would not apply to an instrument endorsed in blank, and stolen before it had been transferred. We shall not examine the premises of this difference, because we could not accept the conclusion. The qualification of the rule, as not applying when the instrument is stolen, was not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not entrusted the agent with the document and, therefore, is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough, if the estoppel is based upon the principle that, when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But, in a case like the present, the agent has been entrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present, and the estoppel arises. The distinction is not new. On the one side are cases like *Knox vs. Eden Musee American Co.*, 148 N. Y., 441, where an agent or servant simply had access to a document temporarily in the possession of the owner; on the other, cases like *Pa. R. R. Company's Appeal*, 86 Penn. St., 80, where possession is entrusted to an attorney for one purpose and he uses it for another. It cannot matter in the latter case that the agent intended the fraud

from the outset. (Citations.) It is found by the court that the testatrix did not know of the custom, and, if the question before us was the construction of a contract, her knowledge might be important. But she knew that she was putting into her agent's hands an instrument which made actual deceit possible, and it is not argued for the plaintiff that, under such circumstances, considering the nature of the usage which has been adopted as law in many jurisdictions, she did not take the risk of the appearances being interpreted as it is usual for business men to interpret them."

It will be noted that the certificate, in this case of *Russell vs. Telephone Co.*, was delivered by the owner to her agent, whose possession was constructively hers in the fullest sense that the possession of Myers in the case under consideration was the possession of the plaintiff. The agency, in the case cited, was to surrender the certificate for the purpose of securing a new one; in the case at bar, it was to surrender the certificates to the former owner, upon obtaining from him payment of the amount of his indebtedness to the plaintiff. But, notwithstanding the attempt to distinguish the two cases at pp. 46-7 of the brief for plaintiff, it is, we submit, impossible to find that the agent in the one case "was clothed with the power to use them as his own" in any sense in which the agent in the other case was not equally so clothed.

Russell vs. Telephone Co. was followed by *Gardiner vs. Trust Co.*, 190 Mass., 27, which was the case of overdue, non-negotiable paper, obtained through fraudulent representations by an agent, who assigned it to a Trust Company to secure his own debt, to which case the court applied "the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must

fall upon the one who by his trust and confidence has enabled the perpetrator of the fraud to commit it. (Citations.)"

This case was followed by *Baker vs. Davis*, 211 Mass., 429, decided in March, 1912, and therefore subsequent to *Schumacher vs. Green Cananea Copper Co.*, *supra*. "The case falls within *Scollans vs. Rollins*, 179 Mass., 346, and *Russell vs. Telephone Co.*, 180 Mass., 467. The principle of law established by these cases is that, if the owner of stock knowingly places in the hands of another the certificate therefor, either indorsed in blank or by a separate instrument of transfer or power of attorney, the person to whom the certificate and instrument are delivered can pass a good title by delivery or pledge, regardless of the relation between him and the owner. This is not on the ground that a certificate becomes a negotiable instrument, but on the ground of estoppel, because the owner, having given to another such indicia of title as clothes him with the appearances of ownership, is precluded from setting up title in himself as against the holder in good faith."

In *Penna. R. R. Co.'s Appeal*, 86 Pa. St., 80, cited and approved in *Russell vs. Telephone Co.*, *supra*, an executrix deposited with her legal adviser for safekeeping, only, a certificate of stock, the power of attorney on the back of which had been assigned by the decedent thirteen years before. The lawyer pledged the certificate as collateral security for his own debt. Judge Sharswood was of opinion that the age of the power of attorney was sufficient to arouse suspicion, but held, nevertheless, that "there was negligence on the part of the appellee. As executrix, she placed the certificate in the hands of Creeley, as her attorney, with the blank powers indorsed, uncanceled. Thus, by her act, he was enabled to commit this fraud. The equities of the respec-

tive parties are not equal. Where one of two parties, who are equally innocent of actual fraud, must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in the agent or attorney has been the cause of the loss, shall not throw it on the other."

There can be no question, that, in the case last cited, the possession of the attorney was constructively that of his client or principal.

In *Railway Co. vs. Bank*, 56 Ohio St., 351, 388, the court said: "No man appoints an agent to do a wrong, and if, the moment an agent transcends his authority, his relation to his principal ceases, when can a principal be held for a wrongful act? * * * The recent case of *Knox vs. Eden Musee Co.*, 148 N. Y., 441, needs to be noticed. In that case, it will be observed that Jurgins, the wrongdoer, was not the agent of the company to issue or transfer stock. His employment was simply to cancel surrendered stock. * * * This broadly distinguishes the case from the one before us. No disposition is shown to modify the doctrine of the same court as announced in many previous cases, as to the liability of a corporation for the acts of the agents done within the scope of their employment, although not only negligently, but even fraudulently done, and contrary to the purpose and instructions of the company."

Board of Education vs. Sinton, 41 Ohio St., 504, is, if anything, even less pertinent than *Knox vs. Eden Musee Co.* In it the Board, a public corporation, had taken up certain of its bonds and delivered them for cancellation to Davis, one of its members, who fraudulently reissued them. The holder was held not entitled to recover, on three grounds: First, because, as in the *Eden Musee* case, the bonds were not put in the hands of Davis to issue or re-

issue, but solely for the purpose of cancellation, and his act, therefore, was not within the scope of his agency; secondly, because the Board of Education, under the terms of the statute creating it, had no power to reissue the bonds, and, therefore, a *bona fide* purchaser could not take any rights, because such reissue, even if authorized by it, would have been absolutely void, and, thirdly, because, under the facts of the case, the court found that the holder was not an innocent purchaser.

Hill vs. Jewett Publishing Co., 13 L. R. A., 193, cited by appellant, holds, simply, that the forgery of the necessary signature of the treasurer to certificates of stock by the president of a corporation, whose only authority as to their issue was to sign them, does not make the corporation liable therefor to holders who take them in private and personal transactions with the president.

Farmers' Bank vs. Diebold Safe & Lock Co., 66 Ohio St., 367, also cited by the plaintiff, is expressly distinguished by the court from cases like the present. In it, the secretary and treasurer of the corporation held a certificate for fifty of its shares, which was legal, valid and regular, and which certificate he assigned to the corporation, in blank, on the demand of the president, who placed it in a safe of the company, accessible to both. Becoming lost, a new certificate was issued, and sold for payment of the indebtedness. Subsequently, the secretary and treasurer found the original, lost certificate, and pledged it as collateral security for a loan to himself. The court said: "The facts do not make a case where the owner of property has put it in the possession of another, with indicia of ownership, so as to invoke the rule that, where one or two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss, must sustain it. The company, when it became the equitable owner of the stock, placed it in the drawer of its president. It did not

place it in the possession, real or constructive, of Tyler.
 * * * This is the case of a stolen certificate."

Returning to the classification, or "heads," of plaintiff's brief, at pp. 36-7, given as determinative of the question whether the plaintiff is or is not entitled to recover, we find the following:

1. There is no right of recovery if the stock certificates were voluntarily placed by the plaintiff in the hands of Myers, in such condition as to clothe him with the indicia of ownership, and to enable him to deal with the property as its owner.

2. The case falls under plaintiff's second "head," with a consequent right to recover only upon the theory that defendant obtained the certificates without the knowledge or consent of the plaintiff, or its voluntary surrender of them to him—in other words, that they were withdrawn from its possession and came into his through theft, not through its voluntary act.

The law, as thus stated by itself, is conclusive against the plaintiff. As pointed out at pp. 13-14, 17-18, *supra*, every fact and circumstance in the case combine to embrace it under the plaintiff's first "head." Not only were the certificates voluntarily placed by the plaintiff in the possession of Myers, clothing him with all the ostensible indicia of ownership, but, as conceded in the agreed statement of facts (Rec., p. 6), they were so delivered to him "in accordance with the usual course of business of plaintiff company."

The sole basis of escape from these, the unquestioned, actual facts of the case, which is contended for on behalf of the plaintiff, is that, although as the record stipulates the plaintiff, by its secretary, as an actual fact delivered the certificates to Myers, and in accordance with the usual course of its business, it did not do so theoretically, because, Myers being the note teller of the company, his possession was its

own, of which it was not deprived until Myers sold the certificates to the defendant, thereby himself obtaining possession by theft.

This suggested substitution of an artificial for the actual state of the facts would destroy the rule of estoppel applicable to all such cases. Under it, had the plaintiff delivered the certificates to Myers for the purpose of taking them to Kelly's office, and of there delivering them to him upon payment of the amount due, it would not have delivered possession to him, or parted with it, or placed confidence in him, but would still, itself, be retaining the possession, so that if, on his way, he should have pledged the stocks with a bank for his own debt, or sold them to an innocent purchaser, his possession for the purpose would have been a possession gained by theft, and the title of the plaintiff would not have been affected.

In *Pa. R. R. Company's Appeal*, 86 Pa. St., 80, cited *supra*, as, also, in *Ambrose vs. Evans*, 66 Cal., 74, the owner having deposited the certificate with an attorney, or agent, for safekeeping, only, it was still in her possession, from which she parted only through theft on the part of the attorney or agent, and the pledgee of the latter could have taken no title. In *Russell vs. Tel. Co.*, 180 Mass., 467, the owner having delivered the certificate to her agent solely for the purpose of surrender to the company, it remained in her possession until so surrendered—its possession was not entrusted by her to the agent, but was obtained solely by stealing it, in his individual capacity, from himself in his capacity as agent, so that his pledgee took no title as against her. The distinction is not attempted to be supported by any authority, and, we submit, is altogether too artificial for the practical affairs of life.

THE ATTEMPTED DISTINCTION BETWEEN PURCHASERS AND BROKERS.

The final point of contention on behalf of the plaintiff is that, even though a *bona fide* purchaser of the stock in controversy might be able to hold it free of any claim or

behalf of the plaintiff, the broker through whom Myers effected the sale, though an equally innocent party, is nevertheless civilly liable to the same extent as is Myers himself. The only authorities cited in support are Kimball vs. Billings, 55 Me., 147, and Swim vs. Wilson, 90 Cal., 126, both of which were cases of the sale of *stolen* property, sold through the agency of an innocent third person. The principle under which, in cases of this kind, the broker or auctioneer is held liable, has been considered *supra*, at pp. 9-10. In the first place, since the owner of stolen goods has not lost them through either his negligence or his mistaken confidence, the rule under consideration is in no way presented in such a case; and, in the second place, since the auctioneer or broker would be liable to the purchaser under the implied warranty of title attending sales of personal property, there is no hardship, but only the avoidance of circuity of action, in permitting the owner to recover the value of the goods from him, and thereby give effect to the sale which the law holds him to have warranted.

That general expressions in an opinion are to be read in the light of the point decided in the case, and are not permitted to control the decision in other suits, where not essential to the points decided, is familiar. Wetmore vs. Karrick, 205 U. S., 141, 155; Harriman vs. Northern Securities Co., 197 U. S., 244, 291.

The contention is equally barren of support in principle. Why should the innocent person who has neither by negligence nor by misplaced confidence contributed to the misadventure be relieved if a purchaser, but, though an equally innocent broker or auctioneer, be required to relieve the person whose negligence or mistaken confidence gave opportunity for the fraud? It is the one of two equally innocent "*persons*," without responsibility in the matter, who is relieved, under the very terms of the rule, which does not limit itself to purchasers.

Swim vs. Wilson is followed by *Brittain vs. Bank*, 124 Cal., 282, in which the rights of the owner of a certificate of stock, endorsed in blank, who had delivered it to his agent, by whom it was fraudulently applied to his own uses, were held subordinate to the rights of the pledgee, in conformity, it is believed, with the unanimous current of authority upon the subject.

"We hold that, when on the face of a certificate absolute ownership appears in him who has possession of it, and there is no evidence outside showing actual or constructive notice that the ownership is in another, the party taking such certificate for value takes title thereto. *Where a loss results, the agent who puts it in the power of another to deal with the instrument as his own, must bear the loss.*" *Westinghouse vs. Bank*, 196 Pa. St., 249, 254.

"Another, equally innocent, dealt with one of the men to whom he [the plaintiff] had entrusted his stock, with all the indicia of ownership; and, when one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer must suffer the consequences of the wrongdoing." *Shattuck vs. Cement Co.*, 205 Pa. St., 197.

There is no conceivable reason why this principle is not applicable to all classes of innocent persons, dealing with the agent whom the owner has armed with the power to act, instead of being applied to innocent purchasers, only.

It is respectfully submitted that there was no error in the judgment below, and that it should be affirmed.

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